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United States Circuit Court of Appeals

For the Ninth Circuit

THE BRITISH SHIP "CELTIC CHIEF", her tackle,
etc., and JOHN HENRY, master and claimant
thereof,
Appellants,

vs.

INTER ISLAND STEAM NAVIGATION COMPANY, LIM-
ITED (an Hawaiian corporation), owner of the
steamers "Helene," "Mikahala," "Likelike,"
and "Mauna Kea," for itself, the officers and
crews of said steamers and other servants of
said owners,
Appellee,

THE BRITISH SHIP "CELTIC CHIEF", her tackle,
etc., and JOHN HENRY, master and claimant
thereof,
Appellants,

vs.

MILLER SALVAGE COMPANY, LIMITED
(a corporation),
Appellee,
and

THE BRITISH SHIP "CELTIC CHIEF", her tackle,
etc., and JOHN HENRY, master and claimant
thereof,
Appellants,

vs.

MATSON NAVIGATION COMPANY (a California cor-
poration), owner of the tug "Intrepid," for
itself and the officers and crew of said tug,
Appellee.

BRIEF FOR APPELLANTS.

Filed

E. B. McCLANAHAN,
S. H. DERBY,

Proctors for Appellants.

OCT 26 1914

Filed ~~this~~ **Monckton**, day of October, 1914.

Clerk.

FRANK D. MONCKTON, Clerk.

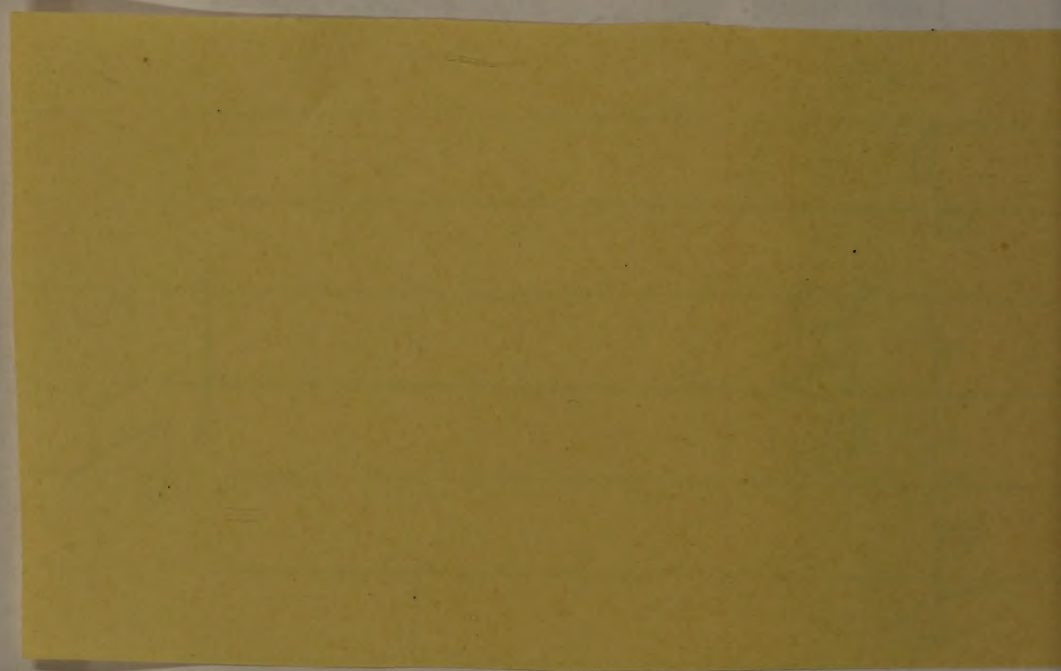
By Deputy Clerk.

These are appeals from three separate decrees rendered by the District Court for the Territory of Hawaii awarding amounts aggregating \$32,011.77 for the salvage of the British ship "Celtic Chief", her cargo and freight money. This amount is made up as follows: To the Inter Island Steam Navigation Company, \$19,511.77 (\$17,500 for salvage proper and \$2,011.77 for special expenses); to the Miller Salvage Company, \$8,500 (\$7,100 for salvage and \$1,400 for expenses), and to the Matson Navigation Company, \$4,000 (VIII, 3376-3389). The three cases gave rise to an extraordinary record containing 3419 printed pages (despite numerous omissions made by appellant under Rule 23), and costing over \$4,000 for typewriting and printing. We believe we may safely say that such a record is wholly unprecedented in admiralty cases and deserves censure and condemnation at the hands of this court. Appellants, however, are not responsible for the size of the record since their testimony only covers 285 pages, as against 1283 pages of testimony for the Miller Salvage Company, and 1573 pages for the Inter Island Company and the Matson Company. We believe that the court will very soon see that all three cases were very simple salvage cases and that the bulk of the testimony was cumulative, unnecessary and largely immaterial, but the appellants had no recourse but to print practically the whole of it. Appellants appreciate that the burden of reading this record is a considerable one, but they also believe that the cases are so simple that the court will have to read comparatively

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little. They feel that the awards in question are so clearly unjust and excessive (even on the lower court's own findings) that they are not to be criticized for incurring the enormous expense entailed in bringing up the cases. If appellants are right in this belief and, as a consequence, the appellees are forced to pay very heavy costs, which diminish even their just claims, they have only themselves to blame and the burden of paying for the record will rest on the parties who made it up. Perhaps it will also tend to reduce the volume of such records in the future.

General Statement of Facts.

The facts of these cases are very simple and, in general, they are correctly and fairly stated in the opinion of the lower court. The presumption, especially in cases of such volume, where the trial court heard most of the witnesses, is so strong in favor of the court's findings that a reference to the decision rather than to the testimony will generally be sufficient. As, however, a clear view of the facts is most essential to a proper consideration of these appeals, and as a correct statement thereof will absolutely remove from the consideration of the court almost all of the testimony in the cases and make the reading of most of the eight volume record superfluous, we shall try to make our statement clear, fair and complete. In some few instances we shall refer to the testimony, but only in a few. We shall also

avoid, as far as possible, stating any disputed facts not covered by the opinion, and shall leave for later treatment what we consider the gross misconduct of the Miller Salvage Company.

At about 2:30 A. M. on Monday, December 6th, 1909, the British sailing ship "Celtic Chief", laden with a cargo consisting mainly of fertilizer, ran aground on a reef in the near vicinity of Honolulu harbor (VIII, 3348-3349). According to the court's findings, which we accept in this and most instances, the character of the reef was coral not hard enough to withstand grinding under the weight of the vessel and sand, but principally coral (VIII, 3349). The weather throughout was fine with a light southeasterly breeze (Id.). There was, however, a considerable, though by no means extraordinary, swell near the ship, which swell broke further in than the ship (VIII, 3350). We shall have more to say of this swell later in discussing the element of danger to the salving agencies. At the time the first assistance came the ship was headed in a northeasterly direction at an angle with the reef with *her stern aground* and her bow free and with her starboard anchor down (VIII, 3351). From the time of her stranding the ship kept going further on the reef until Wednesday morning, but the principal movement inshore took place on Monday and by that night she was aground for her whole length, only moving in about six feet more on Tuesday (VIII, 3352).

The first boat to arrive at the scene of the stranding was the small launch "Huki Huki" belonging to

Young Brothers, at 6:30 A. M. on Monday, and at 7 A. M. the tug "Intrepid" belonging to the libelant, Matson Navigation Company, appeared and, after first demanding \$20,000 to tow the ship off and later reducing this figure to \$10,000 (Henry, I, 118; Briscoe, I, 320; McAllister, I, 90), she made fast (without any agreement as to compensation) with her line attached to the ship's starboard quarter almost directly astern (VIII, 3351). At the time of the "Intrepid's" arrival it was decided by the master of the "Celtic Chief" and Pilot Macauley, who was aboard, that it would be of advantage to get the ship at right angles to the reef so as to receive the sea as much as possible right astern (VIII, 3351). Accordingly the ship's starboard anchor was taken up and with the tug and launch attached to the stern, which was then aground, the ship swung round to the desired position, which position was maintained until she came off the reef at 12:20 A. M. on Thursday, although, as already pointed out, she went much further in-shore in a straight line on Monday despite the efforts of the various towing vessels (VIII, 3351-3352). Thereafter, according to the court's findings (which we accept on this point), the "Intrepid" pulled more or less continuously till Wednesday noon (VIII, 3351). At that time she was requested to make way for the German cruiser "Arcona", of a tonnage of 2800 and a horsepower of 8200, and, on her refusal to do so, her line was cut and she performed no further services. The "Intrepid's" net tonnage was 55.

and her horsepower 350, while she was worth \$30,000 and had a crew of 12 men including her master (Id.).

Referring now to the vessels of the libelant, the Inter Island Steam Navigation Company, Ltd., the "Mikahala", with a net tonnage of 354 and 404 horsepower, giving her an effective thrust of about three tons, carrying a crew of 35 men and being of a value of \$40,000, arrived at about 10:30 A. M. on Monday and made fast to the ship's starboard quarter, putting out a second line on Wednesday (VIII, 3352-3353). She put down an anchor, mainly for the purpose of holding her in position, and pulled on the ship almost continuously until she came off, being engaged about 62 hours (Id.). The next vessel to come up was the "Mauna Kea" at about 11 A. M. on the same day. Her net tonnage was 940, her horsepower 2500, her effective thrust about 12 tons, her value \$325,000 and her crew 60 men (VIII, 3352-3354). She dropped anchor off the ship's port quarter and towed for about 20 hours, exerting a heavy and steady strain on her lines (and in fact breaking two of them) (Id.). She left the "Celtic Chief" at about 7 A. M. Tuesday morning in order to make her regular scheduled run to Hilo with mail, passengers and freight (Id.), and, it may be incidentally remarked, she left the ship in a far worse position than that in which she found her (VIII, 3352). The "Mauna Kea" was replaced by the steamer "Helene" at about 8 A. M. (VIII, 3353). The net tonnage of this vessel was 392, her horsepower 470, her effective thrust a little over three tons, her value \$100,000, and her crew

31 men (VIII, 3354). The "Helene" attached her line to the ship's port quarter and also placed two 2000 lb. anchors astern attached to 90 and 60 fathoms of chain respectively, for the purpose of heaving on the same, and she also pulled more or less continuously with her propellers, her operations lasting for about 42 hours (VIII, 3354, 3372). The lower court gave to the "Helene" the principal credit for the "Celtic Chief's" secure position on the reef (VIII, 3364-3365) and, while we propose to attack this finding, we do not regard it as very material. It is here stated in order to give a complete view of the facts. The last Inter Island vessel to assist was the "Likelike", which came out Wednesday noon (VIII, 3354). Her net tonnage was 214, her horsepower 340, her effective thrust about $2\frac{1}{2}$ tons, her value \$100,000, and her crew 28 men (VIII, 3354-3355). She laid her anchor about two points off the ship's stern and made fast to the port quarter, towing more or less continuously till the "Celtic Chief" was rescued (Id.). Although there is much evidence to the contrary, both from the witnesses for the "Celtic Chief" and from those for the Miller Salvage Company, we consider it hopeless to contend as against the lower court's findings that neither the Inter Island vessels nor the "Intrepid" were doing any pulling, and we accept unreservedly the findings on this issue.

In addition to the services of these boats in towing, the Inter Island Company during Tuesday and Wednesday lightered about 365 tons of cargo into small boats, employing about 100 extra stevedores

for this purpose (VIII, 3356). The ship's winch was used for this lightering, but on Wednesday a floating donkey-hoist (secured for \$15, VII, 2877) was moored on the ship's port side and greatly facilitated the operations (Id.). The lower court found that there was some danger to the men employed in the lightering operations due to working the small boats in a swell under overhanging slings (VIII, 3371), but it is worthy of note that no accidents happened and the only damage testified to was the loss of a *pair of oars* from one of the boats (Piltz, V, 2039; see also Nelson, VII, 2817-18; Haglund, VIII, 3038). The value of the cargo lightered by the Inter Island Company was \$15,177 (Watkins, III, 1203).

We also should not omit to mention that Captain Haglund, the Inter Island Company's superintendent, was in general charge of its operations, and in addition the company had its president, two of its directors and its attorney also on the job, principally as spectators, but perhaps also to look after its salvage rights (see Lewis, VIII, 3232). Salvage under legal advice appears, however, to be usual in Hawaii (Cf. *Pac. Mail SS. Co. v. Com. Pac. Cable Co.*, 173 Fed. 28, 42).

Referring now to the work of the Miller Salvage Company, it appears that on Monday morning at about 8 A. M. Captain F. C. Miller, its superintendent and principal stockholder, offered his assistance and later brought out several boats, which, as we later propose to show, can best be described as old hulks, and proceeded to lighter some 239 tons of fertilizer of the value of \$12,162, ceasing operations at 2:30

A. M. on Tuesday (VIII, 3355; III, 1202). This lightering, according to Captain Miller's own testimony, to which we shall later refer, simply had the effect of driving the ship further on the reef, and this was also the effect of his ships lying alongside the "Celtic Chief". The court finds, however, that libelee's claim of negligence in the Miller Company's having begun lightering without first putting out an anchor comes with poor grace from the master of the "Celtic Chief" who, the court says, was advised by Captain Miller from the first to have an anchor put out (VIII, 3369-70). We wholly dispute this finding, but here state it for the sake of a consecutive presentation of the case. In addition to the lightering Captain Miller came out on Tuesday with a 10,000 lb. anchor which, according to the court's statement, "was *finally* laid out astern and connected with the 'Celtic Chief'" (VIII, 3355). It should be noted, however, that this anchor was first dropped on Tuesday evening off the "Celtic Chief's" port quarter (I, 296; II, 578; III, 986, 989, 1092; Miller, IV, 1353; Macauley, VI, 2229-32), and was not used till it was later raised on Wednesday and *then* dropped directly astern (Miller, IV, 1356; Macauley, VI, 2240-41). This anchor was then connected with the "Celtic Chief" by powerful tackle and we admit it exerted a considerable strain. The Miller Company employed from 45 to 60 men, most of them working overtime (VIII, 3356). We shall deal with the value of its vessels and the anchor in question later, but it is worthy of note that the court found that their values, as testified to by Captain Miller,

could be safely discounted *one-half* and still be very liberal (VIII, 3373).

About Wednesday noon the German cruiser "Arcona" came out to the ship's assistance. She insisted on having the "Intrepid's" position, which was the best as being directly astern, and took that position after the "Intrepid's" line was cut (VIII, 3357). She first dropped her anchor dead astern, but later, after breaking her line and drifting rather close to the "Helene", she slightly shifted her position and relaid her anchor three or four hundred feet ahead of the "Mikahala's" bow (VIII, 3358). The testimony is unanimous, however, that her position remained almost directly astern of the "Celtic Chief" (I, 333, 392, 394; II, 429, 486, 632, 695; III, 1027, 1028, 1107; IV, 1356; V, 1830, 2033; VII, 2838, 2899; VIII, 2963). As to what happened thereafter we quote from the court's decision:

She paid out more chain and swung westward toward the "Helene" until she was halfway between the "Helene" and the "Mikahala" and seaward of them a little. She then ran a wire of her own and took one from the ship, started her engines ahead, and after pulling for from five minutes to a half-hour, broke the ship's wire at about 3 o'clock. She then attempted for several hours to get a long wire aboard the "Celtic Chief", but failed, and again ran two wires, using the ship's broken wire which had been spliced and reinforced; between 6 and 7 o'clock she had finally made fast, and proceeded to "equalize" the wires and to then heave in on her anchor-chain, not using her propellers at all. She kept somewhat of a strain on her anchor-chain thereafter until the ship floated. About 8 o'clock she turned on her

two large search-lights, which afforded a favorable condition for the salvage operations during the rest of the evening.

VIII, 3358.

The court, after analyzing the evidence, found as follows as to the "Arcona's" pulling:

On the whole, though the depositions leave much to be desired on this point, I am of opinion that there was some strain on the "Arcona's" lines, perhaps such a strain as the power of her winch would permit, or could effect under the conditions,—it being remembered that the weight of the two long steel wires and the force of the current and swell against the comparatively large mass of the cruiser gave some resistance for the winch to overcome, aside from the resistance or inertia of her anchor and anchor-chain. I do not find that the winch was being used constantly, but, in accordance with the commander's orders, that "the hawsers were to be made taut by heaving in the chain", and "to be kept taut all the time by heaving in the chain as soon as the hawsers would slacken". Witness Mason described her lines fairly when he said that the "Arcona" was "only hanging on to her anchor",—"not pulling, but her lines were fairly taut."

VIII, 3362-63.

This finding, though by no means as favorable a one to the "Arcona" as the testimony of her disinterested officers would justify, is at least a finding that she was exerting some strain on her lines and heaving on her anchor chain, and we have no doubt but that this court will accept that finding. We shall later discuss whether this pulling by the "Arcona" was so small an element of aid as the lower court found it to be. It may be men-

tioned here once and for all that the "Arcona" was a large and powerful cruiser having a tonnage of 2800 and a horsepower of 8200 and a full equipment of anchors and lines (VIII, 3357). Her tonnage and horsepower were greater than those of *all the other vessels combined*.

Late Wednesday evening (the pulling agencies having accomplished nothing positive in the way of floating the ship), about 40 tons of cargo having been lightered that evening, and it having been calculated that about 80 would float the ship at high tide, the ship became livelier in her bed and at about 11:45 P. M. Wednesday she was seen to be moving gradually, finally leaving the reef at about 12:20 A. M. Thursday (VIII, 3365-66). The movement, according to all the evidence, was in the direction of the Miller anchor and the "Arcona" and she came dangerously near colliding with the latter vessel (VIII, 3366). When she came off the "Arcona" towed her seaward, stern to stern (perhaps farther than necessary) and then turned her over to the "Mikahala", which took her without difficulty to a safe anchorage, from which she was towed into Honolulu the next morning. The "Celtic Chief" suffered no damage while on the reef, while the loss to the lightered cargo was \$1441 (VIII, 3371). Her value, as found by the lower court, was \$25,000, while the salved value of the cargo, including freight, was \$109,559, making a total salved value of \$134,559 (VIII, 3371-72).

The bias of the witnesses for the various parties should also be noted once and for all in stating the facts. The Inter Island witnesses absolutely discredited all aid

but their own, as did also most of the witnesses for the Miller Salvage Company, and both sets of witnesses vehemently denied that the "Arcona" rendered any assistance. The witnesses for libelee, including the officers of the "Arcona", were a little more liberal and gave considerable credit to the Miller anchor, and we think their testimony entitled to more weight than that of the interested libelants. Be that as it may, however, the fact remains that out of this voluminous and padded record the lower court has found the facts, and it is not likely that those findings will be lightly disturbed. We have tried to state the facts fairly and conservatively, and we again reiterate our belief that this statement renders any detailed examination of the record wholly unnecessary.

Findings of the Lower Court Not Already Taken Up.

The lower court found that the position of the "Celtic Chief" on the reef was a dangerous one, which finding we do not dispute. There was no danger from rough weather, but the court correctly said that storms might have been expected at that time of year (VIII, 3370, 3350). There were, however, no storms in fact. The ship bumped considerably early in her stranding and the court found that this condition and danger were relieved more and more as the salving agencies came to her assistance (VIII, 3370-71). The court found that there was practically no danger to the salving steamers, but that there was some risk "to the men who lightered the cargo into the surf boats, especially the Inter Island

men" (VIII, 3371). It was also found that the towing vessels, and especially the "Helene", were of great assistance in securing the position of the ship and preventing her from going broadside on the reef, the services of all except the "Arcona" being described as substantial and indispensable (VIII, 3364-66, 3370-71). The "Arcona's" services on the other hand were found to be neither substantial nor indispensable and her manner of rendering these services was severely criticised, the court further holding that only \$500 should be deducted from the total award on account of her work (VIII, 3366-68, 3373). The court further found—and we consider this finding of great importance—that it was not the pulling agencies which saved the ship, "but it was the *lightering* that put her further afloat or so nearly afloat *that her moving was comparatively easy*" (VIII, 3364). It was also held that "the pulling agencies did not keep her from going further on the reef at least until some time on Tuesday" (VIII, 3364). The court also said that what was effected on Wednesday night could probably have been *as well and more safely done a day or possibly more earlier* (VIII, 3370). In other words the main credit for the salvage was found to be due to (a) *securing the ship's position*, and (b) *lightering her*. The court said that the services of the salving agents were reasonably worth \$30,000 and that it amounted to about 17½% of the value saved plus 6% interest for 3½ years (VIII, 3373), although, when we consider the additional expense allowances (which are usually merged in a general award), the award is over 20%. In addition the court found against the con-

tention that the Miller Salvage Co. had forfeited its right to salvage on grounds to be hereafter mentioned, although it reduced the award to that company \$900 on this account, and it found that the "Intrepid" should not be penalized *at all* for not giving way to the "Arcona" (VIII, 3368-70; 3373-74).

The Assignments of Errors.

The assignment of errors in the principal case, that brought by the Inter Island Steam Navigation Company, Ltd., (VIII, 3398-3402) is as follows:

1.

That the award of \$19,546.77* (\$17,500 for salvage and \$2,046.77* for expenses) in favor of libelant was and is not warranted by the evidence and was and is excessive and erroneous.

2.

That the court erred in holding and deciding that the ship "Celtic Chief" was in great danger of total destruction and that libelant took any appreciable part in saving her from such danger.

3.

That the court erred in holding and deciding that libelant's vessels and employees ran any material risk while engaged in the salvage service, or any risk at all greatly out of the ordinary.

4.

That the court erred in holding and deciding that the services of libelant in the rescue of said ship "Celtic Chief" were substantial and indispensable, and in not holding that said services were of minor importance and by no means indispensable.

* These figures should be \$19,511.77 and \$2,011.77 respectively.

5.

That the court erred in holding and deciding that the services of libelant assisted in any material degree in preventing said ship "Celtic Chief" from going broadside on the reef on which she was stranded, or in securing her or rendering her more secure and safe in her position on said reef.

6.

That the court erred in awarding to the libelant for its services in lightering part of the cargo of the said ship "Celtic Chief" any sum in excess of the fair value thereof on a *pro opere et labore* basis, and that the court erred in rewarding said services as meritorious salvage services and in making a grossly excessive salvage award for mere lighterage services, and in holding that the men and small boats engaged in said lightering operations were in any material or extraordinary danger.

7.

That the court erred in failing to find gross negligence and lack of skill on the part of the libelant and of its agents in lightering from the "Celtic Chief" before anchors had been put out to prevent her drifting farther aground and in failing to diminish libelant's award accordingly.

8.

That the court erred in holding and deciding that the value of all the salvage services to said ship "Celtic Chief" was the sum of \$30,000, in that said value is not warranted by the evidence and was and is excessive and erroneous, and also erred in basing its award to libelant in part on said excessive value.

9.

That the court erred in attributing to libelant's vessels and appliances and to the ship "Celtic Chief" values not warranted by the evidence.

10.

That the court erred in holding and deciding that the services of the German cruiser "Arcona" were entitled to an award of only \$500 out of said total salvage of \$30,000, and in not holding and deciding that said "Arcona" rendered efficient and valuable services worth far more than \$500 and in not diminishing the awards made to the other salvors in consequence thereof.

11.

That the court erred in holding and deciding that the "Celtic Chief" would have come free without the services of the "Arcona".

12.

That the court erred in attributing undue importance to the value of libelant's steamers engaged in the salvage operations in that said steamers were at no risk whatever during said salvage operations.

13.

That the court erred in considering at all or to any appreciable extent the value of libelant's steamer "Mauna Kea" and the number of her officers and crew, in that said steamer accomplished nothing in the salvage of the "Celtic Chief" and abandoned said "Celtic Chief" at an early stage of the salvage operations when said "Celtic Chief" was in a far worse position than she was upon the arrival of said "Mauna Kea".

14.

That the court erred in giving undue credit to libelant's steamer "Helene" and her anchors and appliances for the secure position occupied by the ship "Celtic Chief" on the reef on which she was stranded.

15.

That the court erred in awarding interest to libelant from the time of the completion of its salvage services.

16.

That the court erred in making, rendering and entering a final decree in said cause in favor of libelant and in not making, rendering and entering a final decree in favor of the claimant.

It is unnecessary to set forth in full the assignments of errors in the other two cases, but the following assignments in the case of the Miller Salvage Company should be noted:

12.

That the court erred in not entirely forfeiting any award to which libelant would have been otherwise entitled by reason of the misconduct of libelant and its superintendent, Captain F. C. Miller.

13.

That the court erred in not forfeiting or greatly reducing the award made to libelant in that its superintendent and principal stockholder, Captain F. C. Miller, did, at a time when he knew that the ship "Celtic Chief" was coming off or soon to come off the reef, deliberately and wilfully and actively conceal said fact from the officers of said "Celtic Chief" and the other salvors, and also in that said Captain Miller both hoped and intended to have said "Celtic Chief" bump the German cruiser "Arcona" when she came off the reef in order to thereby enhance libelant's claim to a salvage award and minimize the services of said "Arcona", and also in that said Captain Miller gave wilfully false testimony in this cause as to the value of libelant's vessels as well as to other material facts in the case.

14.

That the court erred in insufficiently penalizing said libelant and said Captain Miller for the same reasons.

15.

That the court erred in failing to sufficiently consider in its award the selfish and calculating spirit and unfairness toward the claimant with which libelant's salvage service was carried on.

VIII, 3405-06.

We also refer to the following assignments in the case of the Matson Navigation Company:

10.

That the court erred in not entirely forfeiting any award to which libelant would have been otherwise entitled by reason of the misconduct of libelant's vessel "Intrepid", her master, officers and crew.

11.

That the court erred in not forfeiting or greatly reducing the award made to libelant in that the master of libelant's vessel "Intrepid", although repeatedly asked to make way for the German cruiser "Arcona", known to him to be much larger and more powerful than said "Intrepid" and of far greater value to the "Celtic Chief", declined to so make way and give up his place to said "Arcona", and this despite the fact that his position was the best one for the "Arcona" to occupy and that he was promised another position in the salvage operations if he would do so, and also in that he together with his crew actively resisted the cutting of the line of said "Intrepid" by those on board said "Celtic Chief".

12.

That the court erred in declining to penalize libelant or said "Intrepid" on account of the aforesaid facts.

13.

That the court erred in not holding or deciding that the said "Intrepid" was discharged for good cause and its services were thereby terminated be-

fore the salvage of the said "Celtic Chief" and therefore libelant was not entitled to any award or compensation.

VIII, 3409-3410.

Contentions of Appellants.

Under the foregoing assignments of error appellant believes that its contentions can be presented briefly under the following heads:

1. That the award to the Miller Salvage Company taken by itself is excessive, irrespective of any misconduct, in that its lighterage services were detrimental rather than beneficial to the stranded ship, and in that, while its anchor was of considerable assistance, any award of \$8000 for such service alone is wholly disproportionate, and it was negligent in not laying said anchor at an earlier period. Apart from this, however, we shall further contend that any award to the Miller Company was forfeited by the misconduct already referred to.

2. That the award to the "Intrepid" should be forfeited because she failed to make way for the "Arcona" when requested so to do, and that her discharge for good cause before success had been achieved in her operations had the same effect as a voluntary abandonment of the stranded ship. We shall also contend that the award to the "Intrepid" was excessive, even apart from the above considerations.

3. That the award to the Inter Island Company was excessive in that the services of that company were of

the lowest order of salvage services, consisting of mere towing and lightering. We also propose to show that the court attributed undue importance to the value of the vessels of the company in that they ran no risk, and also gave them undue credit for the results which they achieved in securing the position of the ship, besides making too much of the danger to the surf boats employed in lightering the "Celtic Chief". We shall further contend that the court erred in making any award to the "Mauna Kea", which left the stranded ship (without any necessity therefor) in a worse position than that in which she found her.

4. That the court gave too little credit to the services of the "Arcona".

5. That, even if all of the lower court's findings be accepted, the total amount awarded is grossly excessive.

We believe that all of these contentions can be treated with comparative brevity, in spite of the great volume of the record, and with comparatively little reference to most of said record. Of course, appellees can, if they so desire, later complicate the case by a detailed analysis of all the testimony, as they did in the lower court, but appellants feel content in the main to rest their contentions on the correctness of the lower court's findings and to build their case on appeal on those findings.

I.

THE AWARD TO THE MILLER SALVAGE COMPANY.

We contend that the award of \$8500 to the libelant, the Miller Salvage Company, is, even more than either

of the other awards, grossly excessive even for the actual services performed. Its lightering operations were detrimental rather than beneficial to the stranded ship, and hence *at most* entitled to payment on a *pro opere et labore* basis and not as salvage. Its services in laying an anchor were meritorious, but there were both negligence and delay in the performance of this service. The value of its fleet of hulks employed mainly in the lightering was, to say the least, grossly overestimated by Captain Miller, as indeed the court below found. And, finally, any award which might otherwise be made to it should, we contend, be forfeited on account of as gross and palpable a case of misconduct as was ever known in admiralty. Let us take these matters up in their order.

(a) *Lighterage Services.*

As the only services rendered by Miller's so called "vessels" (except the dropping of the anchor, which could have been easily accomplished by any vessel without effort) was in lightering the "Celtic Chief", any value placed on those vessels as *salvage* agencies is to be largely discounted, if their services as *salvage* agencies was unsuccessful, for it needs no citation of authority to show that *success* is necessary before there can be a claim for salvage. Yet the non-success of the Miller lightering operations is established out of the mouths of their own witnesses.

Captain Miller testified squarely on this point as follows:

Q. Now, then, as I understand it, in your opinion the lightering of cargo from the "Celtic Chief" on

Monday, instead of aiding, assisting, or salving the "Celtic Chief", had exactly the opposite tendency?

A. *Exactly.*

Q. *It had the tendency to put her farther ashore?*

A. *It did.*

Q. *And injure her more?*

A. *It did.*

IV, 1550.

Although the foregoing testimony alone would seem to clearly establish the point we wish to make, we add thereto the following additional portions of his evidence:

I told Henry then, "It's useless to lighten up this cargo because the steamers will go in as fast as you go in. We've been lightering her and taken out four or five hundred tons and you've gone further on the reef."

Miller, IV, 1352.

I told that man distinctly that he'd lose his ship if he didn't hold her there and he said come back with the lighters.

Id. 1353.

I told Captain Henry then that *it was suicidal for him, as far as the ship was concerned, to lighten up without something astern to hold it and that personally I did not care to become a party to his ship being lost.* At that time I thought that the ship was insured with the British Lloyds and we have an understanding with them to do our best for their ships. I have regretted since that she was not. He didn't want any anchors and he didn't want anything else and I told Captain Henry then, thinking that the ship was insured in the Lloyds, I said to him, "Captain, all right. I'll take my boats and the anchors and go ashore and if your ship is lost

and stays here on the reef, I'll see to it you lose your certificate." I told him that right on his own deck.

Id. 1355.

Q. Now, was there any other tendency beside merely heaving the ship on the beach that you could observe?

A. Any other tendency? *Yes, there was a tendency of our ships lying lightering alongside to execute the heaving of that ship in on the beach, and that was one of the reasons why I refused to come out and continue the lightering.*

Id. 1404.

A. I don't remember testifying to it before, but I'll tell you here now. Every swell would come in would only lift the "Celtic Chief" in shore, but the more boats you tied to the "Celtic Chief"—I'm telling you this, use it if you like to my prejudice—the more you enhance her going in because it presents that much more of a side to the swell of the ocean.

* * * * *

A. The orders from the time that I first went out to the "Celtic Chief" until the time that I left her, we were under Captain Henry's orders directly, and I did what he told us to do, even after I had advised him not to do it. It was his orders to bring those lighters there and put them alongside the ship. It was his orders to get as much of the cargo as we can and all the men possible, and get the cargo out, and I told him that I thought it was wrong; *if you want to lose your ship, that was (the way) to do it.*

Id. 1548.

Captain Wiesbarth, who had charge of Miller's boat, the "Concord", during the operations, adds his corroboration to the above testimony:

Q. You said she got a little more lively. How could she get a little more lively?

A. By moving in a little bit.

Q. Moving in which way?

A. Moving in shore. *That's the only thing she could do.* Raise the vessel up she would naturally go in little by little.

Wiesbarth, II, 572.

Q. In case—I withdraw that. What would be the effect of discharging cargo from the “Celtic Chief” upon her position, as to whether or not she had gone further in shore as the cargo was taken out?

A. After the wire cable was taut?

Q. No, no, without any wire cable at all; without anything pulling from behind, what would be the effect?

A. *She would go high and dry up on the shore.*

Q. The more cargo you would take out, the further. A. *The further she would go in.*

Id. 588.

To all of this we add the following short extract from the testimony of Captain Henry, the master of the “Celtic Chief”:

Q. What would be the tendency of the mooring of those vessels alongside the “Celtic Chief”, with reference to putting her further on the reef or the contrary?

A. Well, they would have an inclination to put her further on the reef.

Q. The tendency would be to put her further on the reef. A. Yes.

Q. What would be the tendency of lightening the vessel without an anchor out astern or some force adequate to keep her from going further ashore?

A. Well, the more the cargo was lightened the more she would go on the reef.

Henry, I, 258-259.

The uncontradicted evidence in the case, therefore, is that the lightering of cargo by the Miller Salvage Company, *all of which took place on Monday while the ship was constantly moving in*, was *detrimental* to the "Celtic Chief". The lower court says the claim that the lightering should not have been done without first putting out an anchor comes with poor grace from the "Celtic Chief", whose master was advised by Captain Miller from the first to have an anchor put out. Whether such advice was given or accepted will be immediately discussed, but the fact remains that the use of the Miller vessels and men in lightering the "Celtic Chief" did her *harm* and not good. No *salvage* award was therefore justified for such service and Miller's vessels and men entirely disappear from the case as salving agencies and appear only as harmful and *non-salving* agencies. If, as the court found, the master of the "Celtic Chief" requested this lightering before an anchor was put out, we may be, as the court says, estopped to complain. But we are only estopped to complain that the vessels and men should not be compensated on a *quantum meruit* basis. (As a matter of fact Miller himself only regarded his work as in pursuance of a *lightering contract*. V, 1667.) We are certainly *not* estopped to complain at the award of *salvage* for services which were wholly *unsuccessful*, and, therefore, wholly undeserving of a *salvage* award. The lower court failed to take this fact into consideration and, therefore, erred in considering these lighterage services as meriting salvage. We propose to further show, however, that the court's finding as to requesting

that lighterage be done without first putting out an anchor finds no real basis in the evidence.

(b) The Testimony as to Miller's Insistence on Laying an Anchor Before the Lightering Should Proceed.

Although Captain Miller repeatedly testifies in this case that he insisted that an anchor should be laid before he lightened the "Celtic Chief", and although it is clear that such admissions should be used against him as bearing on the *advisability* of lightering *before* such anchor was laid, it is our contention that either no such advice was given or that Captain Miller proceeded *of his own accord* with the lightering in spite of such advice. The lower court found against us on this point solely on the testimony of Captain Miller, but when we consider (1) that the court later found that he was guilty of false swearing with reference to his misconduct (VIII, 3369); (2) that he had valued his vessels at over double what they were worth (VIII, 3373); (3) that he was guilty of gross misconduct in the particulars hereafter alleged, and (4) that he is absolutely contradicted by other witnesses in the case, one of them being the Inter Island witness, Pilot Macauley, whom the court credited in almost all other particulars, we believe that this court will have no difficulty in discrediting Captain Miller.

Captain Henry testifies as follows:

Q. What did you say?

A. I asked him—he said he represented the Miller Salvage Company and that he had appliances for salving vessels here, and *he pointed out to me* that the best thing I could do was to lighten the ship

Q. What did you say?

A. I agreed to it, that I ought to lighten the ship, and that it was the best thing I could do, and after a bit of consideration I agreed with him to get launches out and lighten the ship up.

Q. Was anything said as to terms?

A. Nothing said as to terms.

Q. What did he do?

A. After that he told me that if I had a large anchor we could get it out astern, and he said he had a large anchor, and I asked him how large this anchor was and he said it was a seven ton anchor, and he said if we could get it out he would bring it out and lay it out astern.

Q. What for?

A. To keep the vessel from going further on the reef.

Q. Did he do that? A. Not at that time.

Henry, I, 132.

Q. Did you have any talk with Captain Miller about whether he should lighter the ship "Celtic Chief" first or whether he should put out an anchor astern first and hold her? A. Quite so; yes.

Q. What did you tell Captain Miller to do and what was done?

A. I asked him if he could get that anchor out.

Q. Did you ask him first to lighter cargo?

A. I did not ask him; I asked him the second time when we were speaking about the anchor.

Q. And he told you, didn't he, that you ought to get an anchor out astern?

A. Yes, and *I asked him if he could get that anchor out.*

Q. And you asked him to get it? A. Yes.

Q. And he did get it?

A. Not at that time; it was Wednesday morning that the anchor was dropped astern, after eight o'clock.

Id. 247.

Q. Had you given him any orders to get the anchor out at that time, prior to Tuesday morning?

A. *I understood when he left the ship that he was going to get the anchor out and send lighters to the ship at the same time.*

Id. 248.

Q. Did you discuss with Captain Miller the possibility of lightering without an anchor out astern?

A. Not at that time.

Q. Did he advise that lightering should take place?

A. *Yes, he did advise that.*

Q. Although there was no anchor out astern?

A. Yes, that is so.

Q. What was the purpose of this?

A. It was to try and float the vessel to get her off the reef if possible.

Q. That was Captain Miller's advice, was it?

A. Yes.

Id. 259.

Of course, the evidence of Captain Henry is interested, although, in view of Miller's evident perjury on various subjects, it should be preferred to the latter's. Yet it is at least partially borne out by the evidence of Captain Macauley, the pilot:

Q. Were you present at the conversation between him and Captain Henry? A. I had.

Q. Will you tell us what that was; what arrangement was made?

A. He said that he had some schooners in the harbor.

Q. Captain Miller said?

A. Captain Miller, representing the Miller Salvage Company, and *that he could get them off as soon as possible and lighten the ship.* Captain Henry consented to him doing so and to have the schooners come off as soon as possible.

Q. In that conversation was any reference made to anchors, any anchor that Captain Miller had?

A. None whatsoever to my knowledge.

Q. Then the only understanding of which you know on that occasion was that these vessels were to be brought out to lighter?

A. To lighter the ship, at that particular time.

Macauley, VI, 2252-53.

Q. Do you know whether any arrangement had been made that he should bring out an anchor?

A. Not that I know of. We expected that he would come back to lighter the vessel.

Q. So far as you know there was no agreement between him and Captain Henry that he was to bring an anchor instead of lightering?

A. Not that I know.

Q. Have you any knowledge of any conversation between Captain Miller and Captain Henry in which Captain Miller urged the use of an anchor, before any further lightering was done?

A. I have no knowledge of any such conversation.

Q. Might they have had such a conversation without your knowledge? A. Oh, yes.

Q. How frequently were you in communication with Captain Henry regarding operations?

A. Continuously. There wasn't a move made at all in connection with that ship while she was on the reef, but Captain Henry asked my advice on the matter; that is, that I know of.

Q. That is, he did nothing without asking your advice?

A. He did nothing that I know of without asking my advice.

Id. 2257.

Q. Did Captain Miller at any time in your presence or within your hearing state that it was suicidal to lighter cargo from the "Celtic Chief" without having an anchor placed out to hold her?

A. I don't remember Captain Miller ever making such a remark to Captain Henry.

Q. What?

A. I don't remember Captain Miller ever making such a remark.

Q. Don't you think you would have heard it if he had made such a remark? A. I think so.

Q. Did you hear Captain Miller make this remark, that he would take his anchor and go back and Henry, the captain, would lose his certificate or he would see to it that the captain lost it?

A. I don't remember hearing any such remark.

Q. If there had been any such remark would you have heard it? A. I think so.*

Id. VII, 2606-2607.

In view of this evidence and the unquestionable falseness of Miller's testimony in other respects, we submit that Miller's offer of an anchor, if made, was considered *by him* as secondary to the lightering, and that he proceeded with the lightering of his own accord and not on Captain Henry's insistence. We, therefore, further submit that the services of the Miller Salvage Company in lightering the "Celtic Chief" should not be compensated in any respect whatever. What was done was done with the knowledge that the service was *absolutely harmful* and with no valid excuse for its rendition. If the court holds with us on this point, as we believe it must, the Miller vessels and men (except those working on the anchor) merit no further notice in this case and the award must, of course, be greatly reduced irrespective of any misconduct.

* Miller testifies that Macauley was present at this conversation (IV, 1355) and therefore the above evidence is very valuable.

(c) *The Laying of the Miller Anchor and Its Value as a Salving Agency.*

It is a difficult question in this case and one not entirely solved by the court's decision to say of just what aid this anchor was in getting the "Celtic Chief" afloat. According to the testimony of most of the Inter Island witnesses it was nil, many of them testifying that Miller never took up the slack in his lines, but simply heaved his anchor overboard, connected his cables and tackles and did nothing more (see, for instance, Piltz, V, 1801; Tullett, VII, 2683; Lewis, VIII, 3247-48). However, we ourselves can give little weight to the testimony of these witnesses and we cannot and do not ask the court to do so. Their bias is as apparent as that of the witnesses for the Miller Salvage Company themselves, who thought the vessel was pulled off solely by the big anchor and nothing else. We admit on this appeal that the Miller anchor had a good strain on it and was of some aid. Nevertheless, the efficiency of its aid was not great, for the lower court found, as before stated, that it was not the pulling agencies that saved the ship; "but it was the lightering that put her further afloat or so nearly afloat that her moving was comparatively easy". It should also be remembered in this connection that the only lightering to be credited in this connection is that of the Inter Island Company on Tuesday and Wednesday, since the lightering of the Miller Salvage Company on Monday simply resulted in putting the vessel further ashore and had much better not have been done at all. Under the court's findings the Miller anchor must, of course, be credited as a salving agency,

but not as one of any vital importance. It stands to reason that the mere dropping of an anchor and working on it with the "Celtic Chief's" own appliances, as was the case here, could be more than liberally compensated by a small fraction of the amount awarded to the Miller Salvage Company in this case. It would certainly appear that the vast mass of testimony taken as to this element of aid was useless and unnecessary.

Nevertheless it must, of course, be admitted that the getting out of a large stern anchor, placed as the Miller anchor was finally placed, was a matter of considerable importance to the "Celtic Chief". And if the Miller Company had got out its anchor promptly, it would undoubtedly have helped to check the shoreward movement of the "Celtic Chief" far more than any boats could have done (see Keech, VIII, 3337). The Miller Company, however, failed to act with promptitude and, although the "Celtic Chief" stranded early Monday morning, the anchor was not placed till some time on Wednesday (see statement of facts, *supra*). According to Captain Wiesbarth the anchor could just as well have been taken out on Monday as on Wednesday, but, as he said, "I didn't have no orders" (Wiesbarth, II, 628-9). We are, of course, bearing in mind Captain Miller's testimony that Captain Henry refused to let him bring it out on Monday, but we think we have clearly shown that this testimony is false. We, therefore, have a case where gross negligence is proved against the Miller Company both in too early lightering and in the failure to get out its anchor until after the ship's shoreward movement had been checked. There is at least implied

criticism of Miller's delay in the court's finding that what was effected on Wednesday night could have been as well and more safely done a day or possibly more earlier (VIII, 3370).

Unfortunately for the Miller Salvage Company, however, its negligence does not stop at this point, for it actually brought out its anchor on Tuesday evening and dropped it in the wrong place, a point which the lower court wholly overlooks. Wiesbarth's evidence is clear and conclusive on this point:

Q. What was the reason for picking it up again on Wednesday morning?

A. To find a better position. It was about dark on Tuesday evening when we dropped it.

Q. What was the—what was there in choice of position? You say you wanted a better position?

A. In the evening we didn't get it in the right place. It was getting dark. *We just dropped the anchor* and waited until daylight in the morning.

Wiesbarth, II, 580.

Q. Wasn't it right astern of the vessel the first time?

A. We couldn't place it in the night time, we couldn't see. *We dropped it anywhere.**

Id.

Q. These vessels, the "Makee", "Concord", and "Mokoli", were all available for taking that anchor out on Monday, were they not?

* * * * *

A. If we had got orders Monday morning we could have stuck it in the "Makee".

* As a matter of fact it was not too dark to bring a line aboard the "Celtic Chief", because it was in fact brought aboard and cast off owing to the anchor being in the wrong place (Miller, IV, 1354; Macauley, VI, 2234).

Q. You could have? A. *I didn't get orders.*

Q. But you could have taken it if you had been ordered to do so by Captain Miller?

A. *I didn't have no orders.*

Q. You could have done so?

A. *Yes, I could have done it.*

Q. If it had been taken out on Monday morning, Captain, it could have been laid just the same as it was laid on Wednesday morning could it not?

A. *I think it could.*

Q. It could have been? A. Yes, I think so.

Q. Would the "Celtic Chief" have gone further ashore, as you have testified that it did during Monday and Tuesday, if the Miller anchor had been brought out Monday morning and used?

A. I think if the anchor had been brought in earlier the vessel would have stayed a little farther out.

Id. 628-629.

Furthermore, according to the evidence of Captain Scott of the "Mokolii", another Miller vessel, it took almost the whole of the forenoon on Wednesday to lift the anchor and drop it in its proper place (Scott, V, 1918). There is no doubt but that the proper place for the Miller anchor was dead astern where it was finally laid, and not where it was first dropped "because it was dark" (see Henry, I, 132-133; Macauley, VI, 2238-39; Mason, III, 989). Captain Miller himself finally had to admit this (Miller, IV, 1587).

We confidently submit, in view of the facts above detailed, that there is strong ground for a contention that Miller forfeited any right to an award for the use of his anchor, apart from any actual misconduct, and that in any event the award should be little greater than enough

to cover his bare expenses. When we consider Miller's actual misconduct in connection with the foregoing facts, however, it is most evident, to us at least, that he is entitled to no award whatever.

(d) The Value of Miller's Crafts and Appliances, the Danger to Which They Were Subjected and Captain Miller's Testimony on These Points.

Although, in view of the foregoing discussion, we regard the above heading as of minor importance, it should be given brief mention both for the purpose of a full discussion of the case and also to illustrate further the character of the libelant in question—a libelant who, in our opinion, should in the interest of justice be exposed and discredited.

Miller's testimony as to the value of his vessels and appliances is set out in the court's decision (VIII, 3372-73) as follows:

Concord	\$3,000
Mokolii	8,000
James Makee	15,000
Kaimiloa	2,000
Elizabeth	4,000
Anchor and tackle	12,000
Total	<hr/> \$44,000

The court found that these values were “so *exaggerated* that they can be safely discounted to one-half and still be very liberal” (VIII, 3373). In our opinion the values can be discounted a good deal more than one-

half and we shall refer briefly to a small portion of the testimony on this subject in order to show Miller's spirit in these proceedings and his utter lack of truthfulness.

The "Concord" was from sixty to thirty years old (IV, 1488) and was bought by Miller for \$850, because, according to him, her owner could not pay the bill for repairing her (IV, 1490). The "Mokolii" was about thirty years old (IV, 1488) and originally cost Miller \$350 (IV, 1490). The "James Makee" was over thirty years old and cost \$4500 (IV, 1486-87) and, although he testified that she was worth \$15,000 because of improvements he had made, he returned her for taxation at \$3500 (V, 1684). Miller's efforts to first dodge this tax return (IV, 1485-86) and then to explain it (V, 1684-85) are little short of ludicrous. The principal alleged improvement on the "Makee" was a new windlass, which Miller said he bought from James F. Morgan, an auctioneer, for \$500 (IV, 1467-68), but Mr. Morgan's bookkeepers show that he actually paid only \$105 (VIII, 3309, 3314). The "Kaimiloa" was a Hawaiian battleship *seventy* years old (Loncke, II, 450; Miller, IV, 1488) and was only hired by Miller (IV, 1490). The "Elizabeth" was simply a small launch and need not be considered. It might also be mentioned that none of these vessels were able to proceed under their own steam except the "Mokolii" and of course the "Elizabeth". The "Makee" was capable of steaming, but Miller had not thought it worth while to secure a license for her and the U. S. Inspectors, therefore, locked her engines (IV, 1585; II, 601).

As regards the anchor and tackles we will deal only with the most important items. According to Miller the big anchor was worth at least \$2000 (IV, 1493), and he denied returning it for taxation at \$800 (IV, 1494). This denial proved true, but it turned out that the witness had returned *all* his anchors at \$800 (Id.). He actually paid \$650 for the big anchor, the receipt being produced (libelee's exhibit 4, VIII, 3344). He said that \$1850 was "the net price" of his pump (IV, 1525), but it proved to have cost him \$800 (VIII, 3345). Similar falsities appear as to other items but it is not necessary to enumerate them. Miller's explanation of the low prices for his anchor, pump, etc., found in libelee's exhibit 4 (VIII, 3344), is that during the salving of the S. S. "Manchuria" he was in constant consultation with Captains Metcalfe and Pillsbury, and that, owing to his valuable services, and there being reasons why they could not be put in as expert services, they made things square by selling him his appliances at very low prices (IV, 1529-30). This statement is on a par with the statement already quoted that the witness had an arrangement with British Lloyds to look after their ships. We believe that the court will have little difficulty in discrediting both of these extravagant statements.

As regards any danger to the Miller vessels and men, it is noteworthy that, although Miller testifies that they were in "the most imminent danger" (IV, 1428), the court found that the danger was only ordinary (VIII, 3371). As a matter of fact all danger could have been avoided had the vessels anchored as was later done by

the Inter Island Company in the case of its donkey hoist. And apropos of the small repairs made necessary to the Miller hulks by their bumping against the "Celtic Chief", "it is difficult * * * to see why a salvaged vessel should be compelled to pay, in addition to ordinary salvage, repairs for unseaworthy crafts that may come to her assistance" (*The Hesper*, 18 Fed. 696, 699).

Having now discussed the services actually performed by the Miller Company, and having endeavored briefly to show the general credibility of Captain Miller, we pass to the final feature of this company's services, which, we believe, should lead to a total forfeiture of its award.

(e) *Misconduct of the Miller Salvage Company and Captain Miller.*

It is our contention in this case that Captain Miller was guilty of gross misconduct in deliberately exposing the "Celtic Chief" and her cargo, as well as some at least of the other salvors, to unnecessary danger, in that he knew that the ship was about to come free at least two hours before her final rescue, and not only concealed this fact from the other salvors, but *wilfully and actively suppressed it*. Miller himself, as will be seen, testifies most fully to this effect, and also to the effect that at the time in question none of the other salvors were aiding, and that he did not want them to know that the vessel was coming free because they would then help and he wanted to have the whole credit and glory him-

self. Yet, as he himself admits, there were prospects of a "kona" (IV, 1405), as the lower court itself found (VIII, 3350), and such a storm might easily have destroyed all hopes of salving the "Celtic Chief" and her cargo. Nor is this all. Captain Miller further and barefacedly testifies that he had hoped and intended by the concealment of the facts in question to have the "Celtic Chief", in coming off, ram the German cruiser "Arcona", thus demonstrating that the "Arcona" was doing no pulling and getting the credit for himself.

On the above statements alone it would seem clearly apparent that any award to the Miller Salvage Company must be eliminated. Miller himself admits that he was at the time of the operations the principal stockholder in the company, holding a controlling interest (IV, 1452), and that members of his family held practically all the rest of the stock (IV, 1461). He also admits that he was the superintendent of the company and the operations were under his sole charge and direction (^{IV}~~VI~~, 1453; V, 1679, 1681). It is, therefore, clear that any penalty inflicted on Captain Miller must be inflicted on the company which he represented and which he in fact *was*.

Let us now examine in some detail the testimony bearing on these remarkable matters, and we would say that, except as otherwise noted, all the testimony quoted or cited comes from the witnesses called by this particular libellant.

Captain Wiesbarth testifies that at 10 P. M. on Wednesday the Miller lines were getting slack at times, showing

that the ship was coming off, and that he communicated this fact to Captain Miller (II, 589). The witness, Moses Ekau, also testifies that he felt what was termed "the first jump" two hours before the ship came off and noticed the slacking of the lines (IV, 1251-52). Dick Clarke, one of Miller's head men, also said that he noticed the first jump between 8 and 10 P. M. (III, 1033-34); that he told Captain Miller she was coming off and that Miller said, "Shut up, keep your men going", to which Clarke replied, "My boys all happy now" (III, 1038; see also III, 1044). The following testimony of the witness is worth quoting:

Q. Did you feel the ship give a jump?

A. After I missed my light then I feel the jump.

Q. Did you go and tell Captain Miller about this?

A. I went to tell him.

Q. Where was he? A. He was down the cabin.

Q. Who else was down there?

A. Miller, Macaulay, the captain of the ship and I think, Haglund.

Q. And when was that when he told you, "Keep your mouth shut"?

A. Yes, he came out and said, "Shut up, Dick". I told the boys, "Shut up".

Q. What did you understand that to mean?

A. *I knows he want those fellows down the cabin keep chewing the rag and pull her off.*

Q. He didn't want Captain Henry and Captain Macaulay to know anything about it?

A. I think so. That's why he shut me down, told me keep quiet. He says, "Shut up".

Q. Did you shut up?

A. I did so. I told the boys keep quiet.

III, 1087.

The witness further testifies later on that he told all the men to "shut up" (III, 1092), and that he specifically said to Tom Mason, who was "half ass boss" under him (Mason, III, 964), "We're going to make some money" (III, 1092). As illustrating the attitude inspired by Miller in his employees, we ask leave to be excused for quoting what the men said when they felt the first move of the "Celtic Chief": "There, she's coming; God damn her. *We make money now*" (III, 1115). What Miller and his men were after was *money* and nothing else. The distress of the stranded ship entered little into their thoughts.

We now come to the testimony of Captain Miller himself. Miller says that at about 8:30 P. M. some sandwiches sent by Captain Haglund of the Inter Island Company came aboard the ship (IV, 1360; see also Haglund, VIII, 3150), and that before going down into the cabin to partake of them he told his men to keep on heaving (IV, 1360). He then went into the cabin and he, Captain Henry and Captain Macauley proceeded to eat lunch and tell stories to each other (Id.). He admits the conversation testified to by Dick Clarke and telling him to shut up, *because he was afraid the men in the cabin would hear* (IV, 1362, 1382). We wish now to quote certain of his testimony brought out by his own counsel on direct examination:

Q. How long before this time you rushed out did you tell these men to shut up?

A. Oh, I had gone out between the two bumps after the first bump when I got Macaulay and the captain quiet again, seated down telling stories again and I had gone out in the meantime, then I

come back. *I'm frank to tell you I wanted them to stay down in the cabin. I wanted that ship to come off without their knowledge.*

IV, 1362.

Q. Why did you want to keep the fact that you were pulling the "Celtic Chief" quiet from Captain Henry and pilot Macaulay?

A. I'll tell you why. We'd started to work on that job in the morning contrary to my own good judgment. In the first place we had considerable difficulty in getting Captain Henry to adopt the plan of putting an anchor down and the "Helene". They had made an arrangement without, practically ignoring me, and if the "Celtic Chief" came off they had known that the "Celtic Chief" was being pulled off by the Miller Salvage Co.'s equipment *they would have given those signals to the German cruiser to begin pulling and they would have shared in whatever glory and so far expense.* We'd have to share in the credit of pulling her off.* I wish, your Honor would permit me to say by way of interpolation that the German cruiser had absolutely no more to do with the actual pulling of that "Celtic Chief" than you.

IV, 1363-64.

He further testifies that he knew of his own knowledge that the ship was coming off because he saw the slack coming in a very little, and that after he had assured himself of this "to a dead certainty" he went back to the cabin "*for fear them fellows would come out*" (IV, 1385). A little further on in his direct examination he testifies as follows:

* It had been arranged to give certain signals when the "Celtic Chief" was moving, so that the towing vessels should then put on full speed. Miller's action was, therefore, in defiance of the plan agreed on for salving her.

Q. Had you been out of the cabin during that time?

A. I came out between the two. I came out of that cabin at least a half a dozen times. I came out distinctly after the first bump. *I came out to shut our men up.*

Q. You came up to shut up the first time?

A. I had to come out and tell them between the bumps. *I couldn't talk native and I had to tell one of my men that spoke native to keep them fellows quiet.*

IV, 1387.

All of the foregoing testimony was volunteered by the witness, as if he were proud of it, *on direct examination*. We now proceed to certain of his evidence on cross-examination, from which we extract the following:

Q. Now, you satisfied yourself that the "Celtic Chief" had come seaward several feet at that time, did you?

A. Well, I satisfied myself she'd moved three or four feet.

Q. At that time? A. At that time.

* * * * *

Q. Did you inform Captain Henry and Captain Macaulay? A. No, I did not.

Q. You didn't intend to?

A. No, I didn't intend to.

Q. You didn't want them to know anything about it? A. I did not.

Q. And you went back down there and regaled yourself with lunch? A. I did.

Q. And told stories back and forth? A. Yes.

Q. In other words, it was your purpose to keep them in the dark about it?

A. I didn't tell them that ship was coming off.

Q. You were trying to keep them from knowing?

A. I wasn't holding them.

* * * * *

Q. Preferred not to have them know?

A. I preferred not to have them know, because I told our men two or three times to shut up their noise.

Q. Did you make that the first time?

A. The first time I didn't tell the men at all of the fact that she was moving. Before the first bump those kanakas knew as well as I knew it.

Q. Now, didn't Dick Clarke come over to the cabin and call you out?

A. He came out to the cabin door and called me once.

Q. Wasn't it just after that first bump that he came aft with ————?

A. Possibly, it may have been.

Q. And he told you that she was coming?

A. Dick called me and told me she was coming.

Q. Mustn't it have been the time of the first bump? A. It may have been.

IV, 1559-60.

See also in connection with the above V, 1675.

Q. And then you felt this bump and Captain Macaulay made the remark—no, it was Captain Henry made the remark——

A. No, Captain Henry. Captain Macaulay was telling the story.

Q. And Captain Henry made the remark that the ship must be coming off?

A. He said, "The ship's coming off."

Q. What did Captain Macaulay say?

A. He said, "Sit down! Why, how can it come off? They're not towing." Captain Henry said, "This man's got his anchor out." Captain Macaulay said, "Oh, sit down! Let me finish my story; she isn't coming off."

Q. Did you say anything at all?

A. I think I said to him then—he had said before, if Haglund had had any sense he would have sent him a bottle of beer to eat with that lunch. Captain Haglund had sent over a dish of sandwiches and

pies. I said to him, "If you wait ten or fifteen minutes I'll put you alongside the 'Arcona' and get some beer from them," and Macaulay thought that was a good joke.

Q. Henry thought it was a good joke?

A. No, Henry was uneasy—he was rather uneasy because he jumped out of his chair quick.

Q. Did you agree with Captain Macaulay or did you agree with Captain Henry?

A. *Oh, I agreed with Macaulay.*

Q. What did you do that for?

A. *Well, I didn't want them to know that she was coming off.*

Q. So you were sure that she was coming off?

A. I didn't tell Henry that the ship was coming off. I said, "I'll put you along side that German cruiser in twenty minutes."

Q. In other words, you turned it into a sort of joke in telling them what you thought was the truth?

A. Exactly.

Q. In a jocular way? A. Sure, I did.

Q. You did intend that they shouldn't know.

A. As far as I could.

Q. As far as you could, you gave that impression, you wanted to create that impression? A. I did.

IV, 1562-64.

Q. Well, then, isn't it the fact, Captain Miller, that you were only out on deck once between the two bumps—that is, between the time you went out and told the men to shut up?

A. The best of my recollection is that between the two bumps I only recollect of going out on deck once.

Q. And that was the time you went out and told the men to shut up?

A. Yes, I told them to shut up then, but I may have told them before the first bump.

Q. What were you doing down there in that cabin during that period of time, that is, between the first and second bumps after you had come back

into the cabin again? What were you doing at the time?

A. Telling stories and exchanging experiences.

Q. Didn't you feel pretty sure that there would probably be another movement of the "Celtic Chief" in a short time?

A. I did. *I expected to feel our side, our stern, bump right into the German cruiser.*

Q. At any time? A. That's what I did.

Q. Why weren't you out on the deck?

A. I DIDN'T WANT TO SEE IT. I WANTED TO FEEL IT.

Q. I want to know why it was that you stayed down there in the cabin?

A. Because it suited me to do it.

Q. *That was a pretty critical moment of the salvage of the "Celtic Chief"?* A. *Sure it was.*

Q. *Still you deliberately stayed down in the cabin, feeling that that ship was going to come off at any time?* A. *I did.*

Q. *What was your reason?*

A. *I didn't want them fellows on deck setting up any signal rockets.*

Q. And you stayed down there in order to keep them from sending up the signals?

A. I don't know that my presence with them kept them, but it——

Q. That was your intention, at any rate?

A. *That was my intention.*

Q. Why didn't you want them——

A. *For this reason, if those rockets and signals had gone up the German cruiser would have started pulling right away and she would then claim the credit for pulling that ship off.*

IV, 1565-66.

See also IV, 1567.

There is considerable other evidence upon this point as to the concealment by Captain Miller of the fact

(known to him alone) that the "Celtic Chief" was coming off the reef, and we believe that it clearly and conclusively shows not only mere concealment of the fact in question, but *active suppression* of the same. The testimony speaks for itself and needs no comment. We now pass on to the even more serious feature of Miller's misconduct, i. e., his desire and intention to bump the "Arcona" in bringing the "Celtic Chief" off the reef.

Miller's animus against the "Arcona" has already been shown and his only allusion to intentionally bumping her on direct examination came out in his testimony as to the sandwich supper as follows:

A. I went down on the main deck and told our boys to keep on heaving. I could get to the captain's cabin either from the main deck or through a pilot-house. I stayed there eating some of the sandwiches and some of the pie. The pilot said, "Now, if we only had a glass of beer, if Haglund had only had sense enough to send us a bottle of beer it would be all right." I said to him, "Pilot, you wait about half or three-quarters hours and I'll put you aside the German cruiser and we'll get some beer from her." They laughed at that as a joke.

IV, 1360.

On cross-examination, however, he testified as follows:

Mr. OLSON. I want to ask a question. You said that you hoped that the "Celtic Chief" would bump the "Arcona"?

A. Yes.

Q. One of the witnesses who has already testified on behalf of the Miller Salvage Company testified to a similar wish expressed by you? A. Yes.

Q. Was that—did you—why was that spoken?

A. I wasn't here in the court when he testified. I'm taking your word that he did.

Q. But I say, on the ship was that wish expressed on the "Celtic Chief" while she was coming off?"

A. It was expressed this way: I told those men, "We'll show them a trick or two before we get through with them tonight." *I think I told the men myself that we'd bump her right in the stern.*

Q. And you hoped you would?

A. *I don't know that I said I hoped we would. I intended to do it.*

Q. You intended to? A. I did.

Q. You wanted to bring her up near enough to bump? A. *I wanted her to bump.*

Q. And in heaving on her then that was part of your intention?

A. That was not part of my intention.

Q. *You knew that she was directly astern and you were so directing your appliances that she would bump her?*

A. *That she would have bumped the "Arcona" so there would have been no question about who pulled her off. That was my intention. That was in my mind.*

V, 1669-70.

Mr. OLSON. I'll withdraw my question. At the time, Captain Miller, did you stop to think that if the "Celtic Chief" did as you hoped she would and intended that she would, namely, that the "Arcona," that the "Celtic Chief" should bump the "Arcona," that she would be damaged?

A. I knew that she wouldn't suffer any material damage.

Q. Did you stop to think that the "Celtic Chief" would probably suffer more damage than the "Arcona"?

A. *Sure, she would have suffered some damage.*

Q. I asked you a definite question, would she have suffered more damage than the "Arcona"?

A. *I think she would.*

Q. Did you stop to think of that at the time?

A. I DIDN'T STOP TO CONSIDER THAT.

V, 1671.

Q. And you mean to say with a vessel coming that rapid, if she had gone that rapid, that she would not do any damage?

A. *I said, yes, it would have cost \$200.00 for new plates.*

Q. You mean to say it would not suffer any material damage beyond the plates?

A. She had another 500 feet to go and if she had bumped the "Arcona" she wouldn't have done more than that.

Q. Even though she was coming at the rate of 500 feet per ten or fifteen seconds or about thirty miles an hour?

A. I don't admit that she went that five hundred feet in ten or fifteen seconds.

Q. Why would you have paid money out of your own pocket, as you say, in order to have the "Celtic Chief" bump the "Arcona"?

A. To satisfy beyond any question all doubt as to what agency pulled the "Celtic Chief" off the reef.

Q. You say that you think the "Mikahala" pulled the "Arcona" off to one side which prevented her colliding?

A. I'm giving you the best of my judgment.

Q. Is that what you said?

A. I said I thought so.

V, 1673-74.

As a matter of fact there was serious danger of a collision between the "Celtic Chief" and the "Arcona", as the court expressly found (VIII, 3366), and such is the evidence of all the witnesses in the case who testified on the subject (most of whom also said that the collision was only averted by the "Mikahala" pulling the ship

away from the "Arcona"), (II, 685, 768-9; III, 904-5; IV, 1655; V, 1790; VI, 2100; VII, 2672-73, 2783).

It is unfortunate for Miller that in this instance again we have evidence from his own men showing that they were imbued with his spirit. Tom Mason, the "half ass boss under Dick Clarke", expressly testifies that it would have been better if the "Celtic Chief" had bumped the "Arcona" because it would have shown that the latter vessel was doing nothing (Mason, III, 905, 938). He further testified as follows:

Q. You were disgusted, were you, at the fact that the "Arcona", a government boat, was doing nothing?

A. Right. Everybody says if she had run into the "Arcona" it would have been better if she did.

Q. Who said that? A. Everybody on board.

Q. Captain Miller?

A. Captain Miller himself and the pilot*; everybody on board; even the natives and myself, too.

Q. They all said this?

A. Yes, the people on board I hear saying if we run into the "Arcona" it would be better.

Q. You heard that remark generally by the people aboard? A. Yes.

III, 939-40.

Q. Now, you said that when the ship came off everybody said that it would be better, or all said it would be better if the "Celtic Chief" had run into the "Arcona". When you say all said who do you mean said those things? Any particular person?

A. Well, there's lot of native and lot of people there, and the sailors themselves who said be good we almost run into the "Arcona", and some of them

* It is only fair to state that Macauley denies saying anything of the kind and we do not believe he did so.

said be good that we run into the "Arcona", would be better.

Q. You don't know who said that?

A. I didn't pay no attention. My idea was if we run into the "Arcona" then that would show she was no good.

III, 999.

We submit that the evidence cited clearly shows a deliberate intent on the part of Captain Miller to ram the "Arcona". The evidence speaks loudly on this point and needs no comment, but only careful perusal.

What, then, is to be said of this conduct? Is it to be partially excused and insufficiently penalized, as it was by the lower court, by saying that Captain Miller, if guilty of anything, was guilty of false swearing? We do not think so. His testimony should be taken as a deliberate admission and by it he has shown that he was guilty of both the concealment and suppression of what, to his mind at least, were material facts, and of a deliberate intention to cause a collision between the salved vessel and one of the salvors. When the lower court first found that Captain Miller was guilty of false swearing, and then, in contradiction of this finding, penalized him in the sum of \$900 on the facts, it not only confessed itself in error, but glossed over the offense. We believe it to be too clear for argument that the misconduct in question, when considered together with the detrimental lightering operations, the delay in laying the anchor, and the negligence in finally laying it, should forfeit any award to the libellant in question. It is impossible, of course, to cite authorities which bear

closely on the situation here presented, and it would seem unnecessary to cite any authorities at all. We shall, however, lay a few cases before the court bearing on the principles governing awards to salvors guilty of negligence or misconduct.

In the leading case of *The Clandeboye*, 70 Fed. 631, the salving ship in rendering its services suppressed the fact that other aid had been employed by the ship's mate for a stated compensation. The appellate court reduced an award of \$10,000 to \$1,000, and only allowed the latter sum because there had been a net saving to the salved ship in that amount through the operations. Circuit Judge Goff, in dissenting from even allowing that small amount, said (at pp. 639-640):

“I agree with the court that the agreement made by the masters of the *Clandeboye* and the *Dauntless* must, under the circumstances shown to have existed at the time it was entered into, be declared void, and that it cannot be enforced in a court of admiralty. I do not concur in that part of the opinion that allows the libelant compensation for the services rendered by the *Dauntless*, undertaken, as they were, in bad faith, with a fraudulent purpose, and the intention of suppressing the truth, thereby taking advantage of a vessel, if not in danger, at least in distress, and causing its owners an additional unnecessary expense. *In a case of this character a court of admiralty is a court of equity, and a party who asks its aid must come before it with clean hands, and with such facts as will, ex aequo et bono, show a case proper for its interposition. If the salvors have been guilty of misconduct or of negligence, or have been in collusion with the master, or have attempted to take advantage of the unfortunate, they have thereby forfeited all claim for compensation even for services actually rendered. The*

Boston, 1 Sumn. 328, Fed. Cas. No. 1, 673; *The Byron*, 5 Adm. Rec. 248, Fed. Cas. No. 2,275; *The Lady Worsley*, 2 Spinks 263; *The Bello Corrunes*, 6 Wheat. 152; *Marvin, Wreck & Salv.* §222; *Jones, Salv.* 124; *Cohen, Adm. Law* 171.

The undisputed facts of this case show it to be at least most peculiar, the books containing nothing similar to it, and in my judgment the courts should not aid in duplicating it by tolerating such litigation. I think that the decree of the district court should be reversed, and the cause remanded, with directions that the libel be dismissed, and that the claimant recover all costs."

In *The Boston*, 3 Fed. Cases 932, 936-937, Judge Story says:

"The maritime law demands from all persons engaged in maritime concerns *scrupulous good faith* and uprightness of conduct. And it prescribes this *most emphatically of salvors.*"

The late Judge Hoffman of this district says in the case of *The D. M. Hall*, 7 Fed. Cases 770, 772:

"But, even adopting the more lenient construction of Captain Pratt's conduct, it is impossible to justify it—and obliged as the court always is in salvage cases to consider not merely the value of the services, but *the spirit in which they are rendered*, and to enforce so far as it may by its judgment, the eternal principles of humanity and justice—it must mark by its decree its disapprobation of conduct, which, to say the least, is wholly destitute of that generosity, disinterestedness and 'affecting chivalry' which give in these cases the strongest claim to its favorable consideration."

In *Pacific Mail S. S. Co. v. Commercial Pacific Cable Co.*, 173 Fed. 28, all salvage bonus was denied by this

court to a salvor, partly on account of calculating and mercenary conduct, but principally owing to the *suppression of facts* of which the salved vessel should have been apprised. In that case the court quotes with approval from the case of *The Howard*, 12 Fed. Cases 630, 633, from which we now quote more fully as follows:

“It is not the single act of saving the property of others when exposed to danger, however perilous or laborious the services, that will entitle the salvor to the highest consideration when he presents his claims for compensation. There will always be something in the manner in which the services are performed which will be taken into account, and will have its influence in the decision of such questions. The wrecker who, regardless of personal consideration, gallantly rushes into dangers to preserve the lives and property of others, when exposed to the horrors of ship wreck, or he who promptly goes forward, and contributes his aid when he believes his services will be beneficial in preventing impending loss, without stopping to enquire what amount in dollars and cents his exertions will bring to his own pocket, will always receive that liberal reward for his labors which it is the policy of the law to allow, and which courts feel pleasure in awarding to generous and manly conduct; while he who holds back and quietly looks on at approaching ruin until his own services become indispensable to the preservation of the property he sees exposed, with the expectation that his reward will thereby be increased in proportion to the increased dangers from which the property is ultimately rescued, will find that he is disappointed in the realization of his golden hopes, and that a display of avarice at such a time renders him an object of contumely and reproach.”

“But in proportion to the disposition which this court has always evinced to award with a liberal hand gallantry and merit in the salvors, so, in the same proportion, has it always been disposed to take away that reward from him whose conduct is either illiberal or unworthy.

In the case under consideration, I regret that this rule must be enforced to the prejudice of some of those who claim here as salvors, *not because I believe that injuries to this ship and cargo have resulted from their improper acts*, but because they did not adopt that prompt and liberal course of conduct upon first visiting the bark which they should have done, and which I had believed was characteristic of the Florida wreckers. The course pursued by Captain Tresca cannot be tolerated; *because, if it resulted in no injury in this instance, in another case a similar course might cause the entire loss of the most valuable property*. Besides, such conduct is not befitting him who sets out with the avowed and only intention of affording his assistance in the relief of the property of others when exposed to peril, and who is in the daily habit of presenting that object as an evidence of his general merit as a salvor.”

This language is especially in point as meeting Captain Miller's claim that his misconduct should be excused because causing no damage, and it is also very applicable to Miller in his capacity as a *professional salvor*. The principle that there need be no actual loss resulting from misconduct is borne out by 35 Cyc. 769 (and note to same) where it is said:

“The amount of salvage may be reduced * * * by want of good faith, by slight negligence or misconduct, by want of skill or energy, and by errors of judgment. * * * The extent of this diminution is measured *not so much by the amount of loss*

or injury sustained, as by the moral quality or degree of turpitude of the act complained of."

So also in *The Dosseitei*, 10 Juris. p. 865, 5 N. Y. Law Observer 110, where the salvors left the vessel at anchor for six hours while they proceeded to port for ropes and spars instead of availing themselves of assistance that was offered, it was held that they had not conducted themselves with due regard to the lives and property on board, and that their salvage must be reduced even though no damage was suffered, because of their misconduct. The vessel salvaged was worth £10,000 but only £50 was awarded without costs.

In *The Cape Packet*, 3 W. Rob. Admiralty 122, the syllabus reads:

"Claim for salvage partly disallowed upon the ground the salvors in the performance of the salvage service had displayed great want of skill and had brought the vessel into danger and difficulty thereby. Semble, the deduction in the amount of salvage award is to be measured *not by the amount of the damage sustained* but in proportion to the quantum of negligence or ignorance displayed by the salvors."

In this case Dr. Lushington left it to the masters to say whether the attempt to steer the injured vessel between the Blackstone and the Newstone at the mouth of the Dartmouth Harbor was a prudent and proper measure to be adopted under the circumstances of the case. He says:

"I need scarcely point to you *where the neglect or misconduct is wilful, it entails an entire forfeiture of the whole claim to salvage remuneration.* * * * There may be instances of such gross negligence independent of wilful inattention, as would debar

the claim for salvage recompense. * * * There is also another kind of negligence the effect of which is to diminish the amount of salvage award, not to take it away entirely. The extent of this diminution, I may further state, is not measured by the amount of loss or injury sustained but is framed upon proportioning the diminution to the degree of negligence, not to the consequences."

In *Roberts v. The St. James*, 20 Fed. Cases No. 11,914, where each salving vessel strove to board in small boats and delayed in bringing their vessels to the assistance of a wrecked boat, and used insufficient tackle and inadequate means to get her afloat promptly, it was held to be evidence of such gross negligence as to work a total forfeiture of the right to salvage. The court cites *Marvin on wreckage* to the effect that

"Whenever wreckers have the management of the business and they fail to get a stranded vessel afloat at the first high water at which she might have been floated had they employed the proper means, they must be considered as having failed in skill and energy, and must suffer the just and legal consequences of such failure."

In *The Glory*, 14 Jurist 676, the salvage was diminished two-thirds on account of the misconduct of the salvors in preventing the employment of a steam tug, though no damage accrued to the vessel or cargo on account of such misconduct.

In *The Katie Collins*, 21 Fed. 409, the salvors failed to get the vessel afloat at the first high water at which she might have been floated had they employed proper means (misplaced a beach anchor). It was held that

notwithstanding the vessel was saved the salvors must suffer.

“If in consequence of want of skill in sounding out channels, carrying out anchors, or navigating the vessel, or from any other omission of proper care or skill, the salvors incur unnecessary delay in extricating the vessel from its perilous situation, or get ashore a second time, the salvage ought to be reduced in proportion to the degree of negligence or want of skill; *and when the negligence is gross or wilful, it should be wholly forfeited.*” Citing *Marvin Wreckage* 106, 108, 219, and the *Blackwell*, 10 Wall. 14.

In *The Diadem*, 7 Fed. Cases No. 3874, the amount of salvage was reduced one-half because of 24 hours delay in getting the ship off the reef, which delay resulted from the negligence and errors of judgment on the part of the salvor.

In *The Bremen*, 111 Fed. 228, negligence in beaching a burning ship so near another as to render aid difficult was held to work a forfeiture of salvage, and the same result was reached in *The Aurora*, Fed. Case No. 659, where wreckers unnecessarily lightened a vessel in order to magnify their services.

These last few cases not only bear on Miller's active misconduct, but also on his gross negligence in too early lightening and his delay and negligence in getting out his anchor.

See also *The Neptune*, 1 W. Rob. 297.

In *Kennedy on Civil Salvage*, p. 127, it is said:

“As the good conduct of salvors, their promptitude, their courage, their energy, and their diligence

will, according to the degree in which these qualities are displayed, enhance their claim to a liberal reward; so, on the other hand, any serious misconduct or negligence on their part, or on the part of their agents, will work at least a reduction, etc., etc."

In *Abbott on Shipping*, 14 ed. p. 967, the author says:

"Salvors may, through misconduct, forfeit all claim for salvage award, or the amount of their remuneration may be curtailed or diminished in consequence of their negligence or carelessness, * * * or by any other act which either damages the property they are salving or exposes it to unnecessary danger."

See also:

Carver's Carriage by Sea, § 346;

Hughes Admiralty, p. 139;

Desty's Shipping & Admiralty, § 326;

The Bello Corrunes, 6 Wheat. 153, 5 L. Ed. 229;

The Byron, 4 Fed. Cas. 956;

Hand v. The Elvira, 11 Fed. Cas. 413.

In the case at bar, if Miller's services were worth anything at all, he could undoubtedly have got the vessel off sooner if he had laid his anchor on Monday or had even dropped it in the proper place on Tuesday. His lightering efforts on Monday did *positive harm* to the stranded ship. If on Wednesday evening he was right in his belief (as he doubtless was) that the ship was coming free, she could undoubtedly have been pulled off at that time with the help of the other salving agencies had he made known that belief instead of having suppressed it. Something might well have happened in the meantime because of which the ship would not have got

off till a day later or not at all. Yet he deliberately subjected the "Celtic Chief" to danger that he might get the more glory for himself. And finally he laid deliberate plans to ram another salvor of whom he was jealous, and thereby further imperilled the salved ship. Such conduct cannot be squared with principles of right and honor, nor can it be excused as being *perjury*. He who seeks the aid of a court of admiralty must come into it, as into a court of equity, with clean hands.

We submit that the award to the Miller Salvage Company should be forfeited *in toto*.

II.

THE AWARD TO THE MATSON NAVIGATION COMPANY.

We contend that the award of \$4000 to the vessel of this libellant, the "Intrepid", is grossly exorbitant for the services performed by her, apart from any misconduct, and that by her misconduct she forfeited all claim to any award whatsoever. Both matters will be dealt with in their order and they can be treated with comparative brevity.

(a) *Services Performed by the "Intrepid"*.

The "Intrepid" came out to the stranded ship at about 7 a. m. Monday morning. Her first service, according to the evidence of Pilot Macauley (VI, 2198, 2388-89, 2398-99), which the court accepted, was to assist in changing the ship's position to one at right angles to the reef so that she would receive the sea directly astern.

The “Celtic Chief” was, according to Macauley, moved from position number 2 on libelant’s exhibit “F” (not printed) to position number 3. This evidence of Captain Macauley is not borne out by the testimony of Captain McAllister or Engineer Barrett, the only two men on the “Intrepid” who were called as witnesses. Indeed, according to McAllister, *at the time he arrived*, the “Celtic Chief” was “*right straight head on*” to the reef (I, 82; see also Barrett, I, 103). It is, therefore, extremely doubtful whether Macauley was correct in saying that the “Intrepid” had anything to do with changing the ship’s position, and the change was probably effected with the assistance of the “Huki Huki” before the “Intrepid” arrived. Giving full force, however, to the court’s finding on this point, it is apparent that, if the service had amounted to anything, the “Intrepid’s” officers would have claimed credit for it in their testimony and not have ignored it entirely. And the facts of the case show that the service did *not* amount to anything. At the time it was rendered the ship’s *stern* was *aground* with her *bow* free and her starboard anchor was down (VIII, 3351). The position was changed by the taking up of her starboard anchor so that *her bow* swung round to the desired position (Id.). Captain Macauley gives this further testimony.

Q. Now, what part of the ship was being thrown around that way? A. The bow of the ship.

Q. I’m not talking about the bow, but the stern.

A. You asked me the question about the ship.

Q. What prevented her stern from being thrown around in that manner?

A. The reef being in contact with her keel.

Q. And that's the reason that her greater draught astern prevented the stern from being thrown against the reef farther to westward?

That's what I told you.

VI, 2388.

In the light of the above findings and testimony we utterly fail to see how the "Intrepid's" towing on the *stern* (which had no tendency to go around) aided the "Celtic Chief" in moving from "position 2" to "position 3" as described by Macauley. With the stern held by the reef and the bow held by the anchor, all that it was necessary to do to assume "position 3" was to raise the starboard anchor at the bow, which would then naturally swing to the west with the current and swell. We hardly think that this court will enhance the "Intrepid's" award because of this alleged maneuver, which her own men claim no credit whatever for. Yet it is readily apparent that the lower court took this service very seriously in making its allowance.

The balance of the "Intrepid's" services consisted in remaining fast to the "Celtic Chief" till Wednesday noon and towing on her,—services of the most ordinary merit. She was in absolutely no danger, there was no difficulty in getting her line aboard (I, 83), and the weather was at all times "very moderate" (McAllister, I, 91). It is claimed that the "Intrepid" assisted in preventing the "Celtic Chief" from going broadside on the reef, and we shall have more to say of this alleged danger in discussing the services of the Inter Island Company. It will simply be noted here that the "Intrepid's" master testified that there was *no* danger of the ship

going broadside (I, 82, 96). And, if there *was* such danger, we fail to see how the "Intrepid", towing on the *stern* of the ship, *which was aground*, could prevent the *bow* from swinging broadside or how, after she and other much more powerful vessels had failed to hold the ship from going *further inshore* head on until she was aground for her entire length (as she was by Monday evening, VIII, 3352), she could have been of the *slightest assistance* in preventing a broadside movement. The "Intrepid's" net tonnage was 55 and her horsepower only 350 and we submit that a boat of this small power could have no effect whatever on the great mass aground on the reef. Had the stranded ship been lightly aground the "Intrepid" might have pulled her off at the beginning of the operations and have gained considerable credit, but after that her use could have been of exceeding little value. As a matter of fact, according to Captain Macauley, the "Intrepid" eased up on her pulling as soon as the more powerful "Mikahala" appeared on the scene (VI, 2223).

As will be seen, the "Intrepid" was dismissed on Wednesday noon and, even on the court's findings, *justly dismissed* (VIII, 3368). At that time no success had attended her efforts, but, on the contrary, the ship was much further aground than on her arrival. How, therefore, can any such award as \$4000 be justified for her services?

In the case of *The Loch Garve*, 182 Fed. 519, this same vessel proceeded to the Island of Molokai, 60 miles away, and assisted in saving a vessel and cargo of materially

greater value. She subjected herself to danger in "darkness, wind and rain" and rendered "genuine, commendable and valuable salvage services" for which she was awarded \$4000. In the case at bar, however, the ship stranded right at the entrance of the "Intrepid's" home port, and the "Intrepid" simply did some ordinary towing and was subjected to no danger whatever, besides which she had been justly dismissed *before the ship was salvaged*. To allow to her in this case *in the same court* the same amount as was awarded in the "Loch Garve" case is simply to juggle with figures and to avoid even an effort at consistency.

We submit that an award of \$1000 would be *most liberal* if there were no misconduct involved, and that, there being misconduct, no award whatever should be made.

(b) *Misconduct of the "Intrepid"*.

It is a cardinal principle of salvage law that success must attend the efforts of a salving ship to entitle her to salvage, and that if she abandons the undertaking before success is achieved no salvage is earned.

In *The Strathnevis*, 76 Fed. 855, 866, the court says:

"Voluntary abandonment of an attempt to rescue a vessel in peril works a forfeiture of the right to salvage. But when salvors are prevented by stress of weather, fog, or darkness, or other circumstances beyond their control, from rendering further assistance, and there has been *no wilful disregard of duty*, on their part towards the imperilled ship, there should be no forfeiture."

In *The Aberdeen*, 27 Fed. 479, Judge Benedict says:

“There can be no question as to the merit of the services rendered by the libelants in their efforts to save the derelict proceeded against in this action. But, meritorious as were the services in question, I cannot reward them, for the reason that the derelict was abandoned by the libelants before reaching a place of safety.”

In *The Angeline Anderson*, 34 Fed. 925, 926, the court says:

“Whatever may have been the value of the services of the libelant in connection with this lighter, they, in my opinion, lost all right to claim salvage therefor by abandoning the lighter when the hawser parted, thereby leaving her adrift in a position of greater peril than she was in at the place from where she was taken.”

In *The Algitha*, 17 Fed. 551, 553, the court says:

“The conduct of Capt. Nickerson, upon observing the signals of distress, in going out of his course, and in lying by the *Algitha* during the night, evinced a highly commendable spirit, and it is with hesitation that I deny all compensation for their delay, and for the 12 hours' towing; but as the *Algitha*, without any stress of weather, was left by him as helpless, and in at least as unfavorable a position, as where he found her, if not in a worse one; and as he abandoned her without any communication or consultation with her master; and as I find that the contract, regarded simply as a towage contract, was not performed,—I do not think it is a case in which there should be any recovery. Services to vessels in distress should be encouraged, but not such as voluntarily leave the disabled vessel in the same plight.”

See also

The City of Puebla, 153 Fed. 925, 926-7 (as to the services of *The Charles Nelson*);

The Loch Garve, 182 Fed. 519, 522 (as to the *Mauna Loa*);

The Flottbek, 118 Fed. 954, 959;

The Edam, 13 Fed. 135, 138 (as to the Persian Monarch).

Further cases might be multiplied indefinitely.

We now submit that, just as a voluntary unnecessary abandonment, before success is achieved, bars the right to salvage, so equally a dismissal of a salvor for just cause must have the same effect. Salvage compensation is contingent upon success—the basis of payment is “no cure, no pay”—and it would seem clear, therefore, that a *rightful* dismissal of the salvor *before* success should forfeit his entire claim. As has been shown, a salvor can make no claim for meritorious efforts, or even beneficial results achieved, if he voluntarily abandons the ship without some compelling necessity. So also he can make no claim if he has been dismissed because of misconduct, which is certainly to be more greatly condemned. Although we have been unable to find any case squarely in point on this issue, the propositions stated would seem self evident, especially in a case of salvage where the relations between the parties are fiduciary (*The Clandeboye*, *supra*). We cite the following cases as somewhat analagous, although in neither was a dismissal for cause involved:

In the case of *The Dantzic Packet*, 3 Hagg. Adm. 383, some boatmen came out with first assistance to the stranded ship and thereafter, when a steamer arrived, resisted the carrying off of a hawser to attach her to the stranded ship. On this subject the court says at p 384:

“Here were the master, the pilot, and the agent to Lloyds—representing the underwriters—all concurring in the necessity of further aid; the boats had failed in their endeavors to get the brig off, and whatever their intention was, as to the aid of other vessels from the Essex coast, no such vessels had come, and the brig might have become a wreck; these boatmen, therefore, had no right to exclude, or to assume a control over further assistance; their obstruction is quite at variance with the spirit of the Salvage Act; and it is a dangerous error, that salvors going to the assistance of a vessel in distress, acquire the sole management of her; they only act under sufferance and permission; and in this instance, from the time the steamer arrived, the boatmen were almost intruders.”

On page 386 the court says further:

“I hope it will be understood, that the master, so long as he retains the command, is fully entitled to regulate the quantum of assistance to be given to his vessel; and he may be extremely blamable if he does not avail himself of all that is at hand, and he may consider necessary.”

In the case of *The Martha*, Swabey Adm. 489, at p. 491, the court reached the following conclusions as to certain boatmen who had rendered assistance to a stranded vessel but who later tried to prevent a steamer, which came out to help, from taking hold:

“Having weighed this and other considerations, and all the evidence, to the best of my power, I have

come to the following conclusions: Ist. That the conduct of the boatmen in going off to the assistance of this vessel was meritorious; that they were called upon so to do by the signals, whatever was really intended by the signals. Secondly. That the charge of the vessel was not given up to them. Thirdly. That the measures they intended to pursue in laying out an anchor, might have been judicious, if steam assistance had not arrived before that could be effected. Fourthly. That when steam assistance arrived, and was engaged by the master, it was their duty to have desisted from the work they were attempting to do. Fifthly. That they *were guilty of misconduct in impeding the employment of the steamer*, and more especially in creating a riot and disturbance, and that they have forfeited all claim to salvage award. Sixthly. That considering their original conduct was laudable, and that though I think misconduct has been proved, I am not prepared to say to the extent alleged, or from the motive attributed, I shall not condemn the salvors in costs."

What now are the facts as regards the dismissal of the "Intrepid"? This boat had unquestionably the best position there was for effective pulling and no other vessel could have got in as good a position (McAllister, I, 95). Macauley says that it was a "splendid position"—"the very best position of them all" (VI, 2223; VII, 2504). It was therefore, naturally the position which the "Arcona" wanted when she decided to come out, and it was to the interest of the stranded ship to give it to her. The "Arcona's" tonnage was 2800 against the "Intrepid's" 55 and her horsepower was 8200 as against the "Intrepid's" 350. In other words, she was about twenty-five times as powerful as the

“Intrepid”, and in fact much more powerful than all the other salving vessels combined.

Captain McAllister testifies that the first request to let go came from a man in a boat (who represented Davies & Co., the ship’s agents), but that he did not know him and, therefore, took no notice of him (I, 85). The man then said he would cut his hawser and McAllister said, “That is up to you” (I, 85, 86). He further testifies that the captain and officers of the “Celtic Chief” called out to him, but he could not hear what they said (I, 94). As a matter of fact he *did* hear, however, for Barrett testifies that the master of the “Celtic Chief” hailed them *three times* and asked them to let go (I, 105), and that McAllister consulted with him and asked his advice (I, 112). Macauley also testifies to the master hailing them three times (VI, 2488), and the captain and officers of the “Celtic Chief” clearly bring out that the “Intrepid” was repeatedly asked to let go and refused to do so (Henry, I, 123; Lowrey, I, 266; Brisco, I, 321). Finally a letter was sent aboard the “Intrepid” which McAllister admits that he took as authentic (I, 94), reading as follows:

8/12/09.

Dear Sir:—

I desire you to let go from your present position as I want to make a good berth for the Man of War. I do not wish you to cast off altogether and *I will take your rope from some other part of ship* trusting you will oblige me

Yours truly
(Sgd.) Capt. JOHN HENRY.

P. S.—Please let go as soon as you see the Man of War coming out.

(Sgd.) J. H.

VIII, 3344.

Captain Macauley himself, one of the witnesses for both the Matson and Inter Island Companies, had advised that the “Intrepid” be let go to make room for the more powerful cruiser (VI, 2491), and both McAllister and Barrett testified that they knew that the request was for the purpose of making way for the “Arcona” (McAllister, I, 95; Barrett, I, 112). In fact, even Captain Wiesbarth of the “Concord” knew it (II, 605). No heed was paid, however, to Capt. Henry’s courteous request and the “Celtic Chief” was forced to cut the “Intrepid’s” line. According to Barrett the following then took place:

The skipper of the “Celtic Chief” wanted us to let go our hawser, and we would not let go. *So he told us three times, and we kept pulling on the rope so that he could not lift it off with all the men he had on board, so he took a blocking chisel and a hammer and chopped the line and wire hawser.*

I, 105.

See also Lowry, I, 266; Brisco, I, 321; Macauley, VI, 2490.

As it is well settled that salvors are subject to the orders of the master of the stranded ship as to what methods should be adopted to salve her (*Kennedy on Civil Salvage*, p. 174; *The Glasgow Packet*, 2 W. Rob. 307, 313), any argument (such as that made in the lower court) that the “Arcona” could fasten on elsewhere, or

had room at the stern without displacing the "Intrepid", is beside the point. Maybe the "Arcona" could have fastened on elsewhere, but it is very evident that this powerful cruiser should have the position of best advantage, which was that held by the "Intrepid". And the evidence comes far from showing that there was room if she had remained at the stern for, although the "Arcona's" position was further out, its lines would have been fouled by the "Intrepid" which had no anchor down and was moving to and fro. Captain Henry expressly testifies that there was not room for both vessels (I, 173), and when we further consider the evidence of the Inter Island witnesses that the "Mikahala" was in danger because of the closeness of the "Arcona" (Piltz V, 1787, 1831), it is very evident that there was not room. However, this is, as stated, beside the point. It was the "Intrepid's" duty to obey orders and she deliberately disobeyed them and actively resisted their enforcement. The lower court expressly finds that "Captain McAllister did wrong in not giving place to the 'Arcona' at the request of the 'Celtic Chief's' master, especially as the 'Celtic Chief' offered to take his line at another place" (VIII, 3368), but declined to penalize the "Intrepid" on this account, thus clearly recognizing the legal aspect of the situation but failing to apply it. It refused to inflict such penalty because, according to its finding, the "Intrepid" "showed the right spirit in moving promptly out of the way immediately when his line was cut, and in laying nearby ready to help if required, even after dismissal by the 'Celtic Chief's' master" (VIII, 3368). She would, however,

have shown a better spirit and would have suffered not at all had she given way when requested to do so, and, as for "laying near" thereafter, she did so after being told by Captain Henry that her services were *no longer required* (McAllister, I, 86), and undoubtedly in order to protect her salvage rights and for no other reason.

It is submitted that the "Intrepid" by her actions showed a disregard for the safety of the "Celtic Chief", and a selfish intent to keep her position regardless of the desire of Captain Henry, in the interest of the "Celtic Chief", to give this vital position to a vessel twenty-five times as powerful. Even though such conduct did not result in any damage, and did not delay the "Arcona" it cannot be tolerated, for in another case a similar course might cause the entire loss of valuable property (*The Howard*, supra). The fact that no damage resulted, and that the "Arcona" was not delayed, was not due to the "Intrepid", but to Captain Henry's vigorous action in cutting the line.

The cases cited in regard to the misconduct of the Miller Salvage Company are all in point here and need not again be repeated. It is not contended that the conduct of the "Intrepid" was so wholly vicious as that of Captain Miller, or even that, viewed only as misconduct, it should cause a total forfeiture of her award, although it should unquestionably reduce it and not be glossed over as it was by the lower court. The "Intrepid's" award is, however, forfeited on the principle already stated, i. e., a dismissal for just cause before success was achieved. The "Intrepid's" award was *contingent* and

she was *rightly* dismissed. How then can she claim any compensation even for services actually rendered? If she can, it would be, in our opinion, subversive of all principles of *salvage*.

III.

THE AWARD TO THE INTER ISLAND STEAM NAVIGATION COMPANY.

No misconduct is involved in the services of this libellant and, on the whole, its work was well performed, so far as it went. We are, however, forced to protest most strongly against the extravagant award to it of \$19,511.77 for the most ordinary kind of work in towing and lightering. We believe that the lower court made this award because of several misapprehensions and wrong conclusions and through a wrong perspective of the evidence.

The court takes pains to point out the large values of the salving vessels, and erroneously says in this connection that the highest value of the Inter Island ships engaged *at any one time* was \$465,000 and the lowest \$240,000. As a matter of fact the highest value was \$365,000 ("Mauna Kea" and "Mikahala" on Monday), and the lowest was \$140,000 ("Mikahala" and "Helene" on Tuesday). This is, however, *only* an error of \$100,000 in each instance! It will be noted also that in reaching a total valuation of \$565,000 for all the vessels, the court includes the "Mauna Kea", valued at \$325,000, which deserted the stranded ship on Tuesday morning.

The main point is, however, that the salving vessels were at no risk whatever, and the lower court did not find that they were. The weather was extremely moderate and the sea calm, the only danger being, as found by the court, to the men engaged in the lightering operations (VIII, 3371) because of the swell near the "Celtic Chief"—a swell which in no way affected the towing steamers. We, therefore, contend that the value of the steamers has almost nothing to do with the case.

See

24 Encyc. Law, 1213;

Kennedy on Civil Salvage, p. 131;

The Werra, 12 Prob. Div. 52, 54;

Sturgis v. The Joseph Johnson, 23 Fed. Cas. 323, 326.

The risk to which a salvor exposes his property is a vital element in salvage and, when that risk is eliminated, the service sinks to a much lower grade. Thus, in *Roberts v. The St. James*, 20 Fed. Cases 921, 922, the court says:

"Salvage service is supposed to be rendered where there is peril, and salvors are not supposed to shrink from any slight danger. Indeed, one of the principal ingredients of a salvage service is the degree of peril to which the salvor exposes himself and his property. *Remove this peril entirely, and a great proportion of the claim is stricken out.* True, the amount of risk which he must accept is for him to determine; but he must recollect that that which is accepted is to be considered in the measure of the merit of their services. If the salvors do not choose to accept risks and encounter perils, they must not expect to receive rewards compensating them for encountering such perils."

And in *Spencer v. The Charles Avery*, 22 Fed. Cas. 917, 919, it is said:

“The measure of compensation in salvage cases depends wholly on the circumstances attending the service. Where there has been great personal exposure and risk, and it is certain that property has been rescued from inevitable destruction by the boldness and intrepidity of the salvors, a liberal allowance will be made. * * * Cases may occur of such extraordinary peril and difficulty, of such exalted virtue and enterprise, that a moiety, even of a very valuable property, might be too small a proportion; and, on the other hand, there may be cases where the service is attended with so little difficulty and peril, that it would entitle the parties to little more than quantum meruit for work and labor.”

See also

The Waterloo, 29 Fed. Cas. 399, 403;

The William Bickford, 3 C. Rob. 355;

The Hyderabad, 11 Fed. 749, 756;

The St. Paul, 82 Fed. 104, 108.

These authorities illustrate the importance of risk to the salvor in salvage operations, and also what the courts mean by the use of the term risk. They do not refer to slight and fanciful dangers, but to real peril of loss. The salving steamers, therefore, not having been in any real danger in this case, the merit of their services is greatly diminished and their large values cease to be material factors. We submit that the lower court erred gravely in not recognizing and applying these principles.

A great deal was made in the lower court of the swell near the “Celtic Chief”, and it finds that the men and

small boats of the Inter Island Company were in danger in working in this swell under overhanging slings (VIII, 3371). The court finds that the average maximum of the swell was about eight feet (VIII, 3350), although many witnesses adverse to the "Celtic Chief" testified to a swell far less than this, including several witnesses for this particular libelant. Kennedy, the president of the Inter Island Company, says that some people who know nothing about swells would think they were very large, but he considered them about *three* feet (II, 748). Piltz of the "Mikahala" said that the mean height of the swell was from five to six feet on Monday (V, 1762), and that it was two or three feet less on Tuesday (V, 1863). Captain Nelson of the "Helene", although testifying to an eight foot swell, says that the same was a "moderate" one (VII, 2776). According to the witnesses for the Miller Salvage Company the swell was the *usual* one and not very heavy (Weisbarth, II, 655; Bray, II, 713). Loncke testifies that it was from three to three and a half feet (II, 445), Mason that it was from two to four feet (III, 926), and even Miller placed it at only four feet (IV, 1430). Captain McAllister of the "Intrepid" said that there was "a light southerly swell" (I, 82).

It will be noted that much of this evidence refers to the swell on Monday, which was by far the roughest day of the operations, and *on which no lightering was done by this libelant*. It looks very much as if the lower court, instead of using the evidence of libelant's own witnesses against it, tried to strike an average between

Captain Tullett's evidence as to a swell of "at least fourteen feet" (VII, 2678) and the other evidence, most of which placed it considerably below what the court found it to be.

Several photographs of the scene of operations were put in evidence and marked libelant's exhibits "I", "J", "K" and "L", exhibit "K" being principally relied on. We think it will need little argument to show that exhibit "K", taken by the aforesaid Captain Tullett, whose testimony as to the swells was grossly exaggerated, even on the court's findings, does not represent an average swell. We believe that the photographer lay in wait to take this picture for use in a salvage suit. Yet a liberal estimate of the height of even *this* swell, judged by the known height of the vessel's stern and poop, would be eight feet, and evidently the lower court gave it full credit and allowed itself to be imposed upon. When we compare the exhibit in question with exhibits "I", "L" and "J" (in which the sea has the appearance of a mill pond), we get some idea of the attempted exaggeration of the true situation.

In any event the fact remains that no one, at the time of the operations, seems to have regarded the swells as especially dangerous, for the small boats came and went freely and safely from the shore and from the various vessels surrounding the "Celtic Chief" without accident or damage of any kind, except the loss of one pair of oars, as has been before pointed out. We also ask the court to note the further fact that most of the Inter Island boats, to save a short distance, did not go to the

lee or sheltered side of the vessel, although the swell was very much less there. Captain Piltz testifies on this subject as follows:

Q. I'm asking why it wasn't quite possible to have discharged from the main hatch into shore boats on the port side of the "Celtic Chief."

A. Why, you never discharge from the port side.

Q. There would have. There was no more reason for using the starboard side so far as the possibility of discharging cargo is concerned than the port side? A. No.

Q. They could have discharged on either side?

A. Yes.

Q. Quite well? A. I think so.

Q. And yet these shore boats went around on the starboard side and took cargo on that side?

A. Yes, because the rigging was already on the starboard side; it was all rigged on that side and it would have required a change of the rigging. That's the reason.

V, 2012-13.

Q. And yet the Inter Island rigged its appliances in such a way that the shore boats, in order to use this appliance, would have to come up on the starboard side where the swell was striking the "Celtic Chief"; is that right? A. Yes.

Q. Although the swell was not striking the "Celtic Chief" on the port side? A. Yes.

Q. Now, let us be clear about this. The shore boats were taking cargo from the after hatch on the port side of the "Celtic Chief." Is that correct?

A. Yes.

Q. And it was only from the main hatch that they were taking cargo on the starboard side?

A. Yes, sir.

Q. And the reason why the barge was able to, why you could use the barge as well as you did, was because it was on the sheltered side of the "Celtic Chief"? A. Yes.

Q. Namely, the port side?

A. Namely, the port side and there was less swell.

Recess.

Q. Boats from the "Mikahala" taking cargo to the "Mikahala" from the "Celtic Chief" could have gone out around the "Arcona" and around the "Helene" and "Likelike" and come off on the port side without any difficulty, couldn't they?

A. I don't understand that question.

Q. These here boats of the "Mikahala" could have rowed around the "Arcona," "Helene," and "Likelike" and come in on the port side of the "Celtic Chief," couldn't they?

A. I should say they could. [2223-1391]

V, 2013-14.

See also Piltz, V, 2021; Tullett, VII, 2675.

We submit that, if the Inter Island Company chose to so rig its appliances that it could only take cargo from the dangerous side of the ship instead of from the safe side (where a donkey engine was later easily operated from an anchored barge in order to lighten the cargo), it cannot charge the "Celtic Chief" with additional salvage on account thereof. The real point is, however, that the Inter Island men employed in the lightering were thoroughly used to that kind of work in the regular course of their business (Piltz, V, 1869-70; see also Haglund, VIII, 3077), and no one believed there was any real danger, however they may have testified two years later at the trial. Captain Nelson, who was one of the few frank witnesses called by this libellant, when asked as to the danger to the shore boats, sums up the situation as follows:

A. Not in extreme danger. They were in more or less danger by being alongside of the vessel by reason of the cargo that was being suspended over the burthen arms. If the swells happened to come in when the sling of fertilizer was just on the gunwale of the boat, if it got in the right position it would capsize the boat. Except for that I don't think there was any danger.

VII, 2776-77.

We submit that the dangers actually incurred were very slight, that they could have been wholly avoided by working on the port side of the "Celtic Chief", and that the lower court fell into error in considering this danger to the extent it did.

Even, however, if we admit that these shore boats had to undergo considerable peril, it must be carefully remembered that the property at risk was of very small value. It is obvious that the bulk of the very large award given in this case was for the use of the valuable Inter Island steamers, *which were not at risk at all*, and not for the use of the shore boats and the men who manned them. If the men on these shore boats had to undergo dangers of a special nature, the award to these men (as against the men remaining in safety on the towing vessels and the Inter Island Company itself) of only an infinitesimal fraction of the total award to the Inter Island Company is unfair. This makes it apparent, we submit, that the lower court, in fixing its award, improperly based it on a salving equipment of large value instead of a salving equipment of very small value, and in so doing we believe error was clearly committed.

It remains now to consider what services were performed by the towing steamers themselves. It is clear under the court's findings that they were not largely instrumental in pulling the ship from the reef, for "it was the lightering that put her further afloat or so nearly afloat that her moving was comparatively easy" (VIII, 3364). It is also clear that these steamers did not keep her from going further on the reef, at least till some time on Tuesday (VIII, 3364), although on Monday the "Mauna Kea" was pulling hard on her and had an anchor down. This vessel, the "Mauna Kea", had a greater tonnage and horsepower than all of the other Inter Island vessels combined, and, if *she* could not hold the stranded ship, it is difficult indeed to see how the others could. If, as the court intimates, the "Helene" with her two anchors down was able to check the movement of the "Celtic Chief", then it was negligence on the part of the much more powerful "Mauna Kea" not to put two anchors down and accomplish the same result a day sooner. We do not say or believe that she could have done it any more than we believe the "Helene" did it, but, if a vessel with a horsepower of 470 could accomplish that result, surely one with 2500 horsepower could have.

During the whole of Monday the "Celtic Chief" kept going further on the reef "until *on that night* she was aground *for her whole length* and moved about six feet still further in on Tuesday" (Decision, VIII, 3352). During this time (i. e., on Monday) the "Intrepid", "Mikahala" and "Mauna Kea", with an aggregate horsepower of 3254, were pulling on her, but they could

not check her inshore movement. At 7 A. M. Tuesday morning the "Mauna Kea" departed and her place was taken at 8 A. M. by the "Helene" (VIII, 3353), which laid out two heavy anchors. The court makes the following rather evasive and unsatisfactory finding in regard to the "Helene's" services:

The pulling agencies did not keep her from going further on the reef at least until some time on Tuesday,—which is rather significant and, to my mind, speaks strongly of the force of the "Helene's" heavy anchors then placed, at about 8 o'clock A. M., far out ahead for the express purpose of holding. Her forward movement had already ceased a day or so before the "Arcona" was finally made fast to the ship. So the cruiser cannot have any credit on that score.

It may be, however, that too much credit should not be given to the "Helene" for the ship's final stationary position, in view of the circumstantial evidence,—afforded by the soundings above given, showing a rapidly lessening depth of water from stern to stem,—of the hard-aground condition of the ship as due to her keel's being carried forward with great force against a more sharply sloping sea-bottom. It may be noted, that earlier soundings had shown 19.5 feet all around the ship; also that her keel was, finally, embedded 6 inches, in Captain Macauley's opinion, and as much as 12 inches in the opinion of other experienced seamen. But this might prove only the ship's stable equilibrium at low or average water, and not that the considerable holding power of the "Helene's" anchors would not be called for at high tide large, when the sea level was a foot and a half or more higher. And, under all the evidence, I feel justified in giving full credit to the "Helene's" anchors for the ship's secure position.

In view of the fact that the ship's shoreward movement had practically ceased on Monday night (the vessel going in only six feet further on Tuesday), at which time she was hard aground all over, and in view of the further fact that vessels with a combined horsepower of 3254 had failed on Monday to prevent her going further ashore; we do not believe that this court will accept the ambiguous finding as to the "Helene's" services. We believe that undoubtedly the "Celtic Chief" had ground a bed for herself in the bottom, and that neither the "Helene" nor the other small vessels engaged on Tuesday (the "Mikahala" and "Intrepid") had any appreciable effect on the great mass aground—either in holding her, steadying her or preventing her from going broadside on the reef. The combined horsepower of all three was only 1224 or less than half of the "Mauna Kea's" horsepower alone. Nor do we see how anchors attached to a small towing vessel, moving to and fro in a seaway, could be of such great help as the court finds, although they undoubtedly helped some. In dealing with a somewhat similar situation this court says in *Pacific Mail S. S. Co. v. Com. Pac. Cable Co.*, 173 Fed. 28, 37:

"The evidence showing, as it does, that the steamers Manning and Maui and the tug Fearless, with 3647 combined horsepower, together with the Manchuria's own engines and two of her anchors, were unable to pull that ship from the reef or keep her from going further on, and that before the Restorer (horsepower, 4000) got any line to the Manchuria the ship was firmly embedded, it does not seem likely that the Restorer was capable of

doing very much in the way of steadying the Manchuria, although no doubt she aided to some extent in that direction."

So in this case. If the "Mauna Kea", "Mikahala" and "Intrepid", with a horsepower of 3254, could not keep the "Celtic Chief" from going further ashore, how could the latter two vessels and the "Helene", with a combined horsepower of 1224, appreciably steady her? As for the "Likelike", which came out on Wednesday noon, and had an added horsepower of 340, the court doubtless would have said as it did of the "Arcona": "Her forward movement had ceased a day or so before the (Likelike) was finally made fast to the ship. So the (steamer) cannot have any credit on that score" (VIII, 3364).

Without going into the evidence pro and con, which is voluminous, and looking at the case broadly on its salient facts, it seems to us clear that the court gave undue credit to the Inter Island vessels, and especially the "Helene", for their "steadying" the "Celtic Chief". And certainly keeping a vessel a little steadier by mere towing, with no danger to the salving ship, is a very ordinary salvage operation and not deserving of a high award such as was made in this case solely for this and the lighterage service.

We further contend that the lower court erred in allowing compensation for the "Mauna Kea's" services, and in considering its very large value (\$325,000) in making its award. This vessel, as already pointed out, was more powerful than all the other Inter Island

vessels combined. Yet, despite her pulling on Monday—and the evidence conclusively establishes that she pulled hard—the “Celtic Chief” kept going further on the reef. Her efforts were, therefore, wholly unsuccessful and she deserted the stranded ship on Tuesday morning in order to make her regular schedule run for Hilo. The principal excuse given for this was that she had to carry mail, but the mail contract put in evidence (libelant’s exhibit “R”, not printed) is simply a general contract by the Inter Island Company not affecting any particular ship. There is no showing that she could not have been replaced on her run by another vessel, as the “Mikahala” was by the “Ke Au Hou” (Haglund, VIII, 2959). We can see no reason why the less powerful “Helene”, for instance, could not have taken her place.

We are not disposed to consider in this case whether or not the “Mauna Kea” is to be greatly blamed for doing as she did, although her large power might well have been very helpful to the “Celtic Chief”. We do contend, however, that by leaving the stranded ship *in a far worse position than she found her* she forfeited her right to salvage. Passenger ships are favored in salvage operations because they give up time which would otherwise be devoted to their own business, but the “Mauna Kea” gave up no such time and proceeded on her regular schedule without loss, so far as the evidence shows. (Let it be remarked in passing that no one on board this ship was called as a witness in the case.) This is not a case like that of *The Strathnevis*, *supra*, where a vessel, after performing a valuable serv-

ice, finds herself forced by stress of weather to discontinue it, but it is a case of *voluntary abandonment* pure and simple.

The cases cited in regard to the award to the Matson Navigation Company are in point here and, in our opinion, they clearly show that the "Mauna Kea" is entitled to no award. (See, especially, *The Algitha*, supra.) In the case of *The Loch Garve*, supra, this court, in characterizing the services of the "Mauna Loa", which similarly left the stranded ship, said:

"We are of opinion that, as the Mauna Loa deserted the distressed ship without necessity, without warning, in good weather, and after but a brief and ineffective effort at help, it is entitled to no compensation other than a reasonable one for sending the telegraphic message from Lahaina."

182 Fed. at p. 522.

The court also said:

"It is obvious, however, that the court below, in including the valuation of the Mauna Loa as a basis for the fixing of its award to the Inter Island Company, proceeded upon a wrong principle."

Id., p. 525.

Both these remarks are applicable to the case at bar. We also wish to cite what the court said in that case as to the services of the "Iwalani" and "Claudine", which also left the ship after pulling under dangerous conditions, but with the intention of returning the next night, which intention the "Mauna Kea" did not have in this case:

"Leaving the ship under the circumstances stated certainly does not place the Iwalani and Claudine in

a high rank as salvors, to say the least, and, as the service rendered by them was without any apparent effect, they are not justly entitled to a high reward.”

Id., p. 523.

We again submit, therefore, that the court erred in considering either the services of the “Mauna Kea” or her value, and that this error should inevitably lead to a large reduction in the award.

We might here as well as anywhere deal with the claim of the Inter Island Company, *always* made in *all* its cases, that its ships are not to be treated as single vessels but as a combined fleet, so that each vessel can come and go whenever it suits her convenience without suffering thereby,—which principle, by the way, did not receive this court’s recognition in the “*Loch Garve*” case. We notice, however, that when it comes to adding up the value of its vessels, and the number of men employed, this libellant is always on the alert to bring these factors to the court’s attention. In fact, in both the “*Loch Garve*” case and this case, it succeeded in imposing on the lower court. This company makes an impressive showing indeed when all these false factors are considered, but the showing becomes far less impressive when one stops to consider the number of vessels and men employed *at any one time* or the values involved *at any one time*. The point we wish to make is that this libellant only contributes its services when convenient and not otherwise, and, except in the case of the “*Mikahala*”, which was replaced on her usual run by a smaller boat, there is no showing in this

case that a single vessel suffered a particle of inconvenience. Doubtless the "Mikahala" also would have left on her regular schedule if she had not had a lot of lightered cargo on board and, therefore, could not carry her usual freight.

Recurring briefly to the services of the vessels of this libellant other than the "Mauna Kea", we feel that we have already covered the "Helene's" services due to the use of her anchors. Apart from this, all she did was to tow more or less continuously and without any apparent effect on the stranded ship. The same is also largely true of the "Mikahala", whose anchor was not placed for pulling purposes, but merely to maintain her in position (VIII, 3353; see also Piltz, V, 1982-3; Haglund, VII, 2896). We do not forget, however, that the "Mikahala" prevented the "Celtic Chief" from bumping the "Arcona", thus frustrating Miller's plans, nor that she brought the ship to a safe anchorage outside the harbor. Neither of these services, however, involved any great exertion or any danger to the "Mikahala". As to the "Likelike", she only began towing on Wednesday noon, long after the ship had ceased moving inshore. She can, therefore, have no more credit than the "Arcona" for securing the ship's position on the reef (VIII, 3364). Waiving the disparity in the size and power of the two boats, it is readily apparent that, if the "Arcona's" services can, as the court found, be fairly compensated for \$500, the "Likelike" is certainly entitled to no more. The lightering was all done by the boats of the "Mikahala" and "Helene", so the "Likelike" can claim no extra credit on that score. If, there-

fore, the "Mauna Kea" is entitled to no award, and the Likelike to only \$500, it is clear that the balance of the award for the services of the "Mikahala" and "Helene" alone is grossly excessive.

Summed up, the situation is that the "Mauna Kea" left the distressed ship, after less than one day's pulling, in a worse position than she found her. The "Likelike" arrived too late to be of help in steadying the ship, and her assistance was of little value because it was the *lightering* that put the "Celtic Chief" afloat, as the court expressly found, and she had no part in that lightering. The "Mikahala" and "Helene" may have helped slightly in steadying the ship and their shore boats, with slight risk and no damage, performed genuine and creditable lighterage services. In effect all the work done consisted of mere towing and lightering,—of a salvage nature, it is true, especially as to the cargo actually lightered, but of the very lowest order.

See

The Hesper, 18 Fed. 696;

Ulster S. S. Co. v. Cape Fear etc. Co., 94 Fed. 214.

The Hesper, *supra*, is a case peculiarly in point. The ship was aground on the Texas coast and admittedly in danger, being pulled off finally by two tugs after a service of *three days* in towing and lightering. There was no danger to the salving ships in their towing, and there was a decided ground swell to impede the lightering, "*not so much, however, but that small boats were plying around the Hesper and life boats were running*

easily to and from the shore". The value salvaged in that case was \$106,500, and the amount awarded was \$4,200, or less than *one-fourth* of the award to the Inter Island Company alone for similar services.

We also submit that the award of \$19,511.77 in this case cannot be squared with the award of \$12,500 in the "*Loch Garve*" case. In the latter case the salving vessels were sixty miles from their home port, they were subjected to considerable danger and performed some of their services in "darkness, wind and rain". In addition to this the salvors had to deal with a drunken captain and undisciplined crew, which resulted in Captain Haglund taking practically entire charge of the operations, even on the ship itself (182 Fed. at p. 523). In the case at bar, however, the salving vessels were practically in their home port, they were in no danger whatever (excepting the small boats engaged in lightering), and they performed their services under ideal conditions of wind and weather. To give even the *same* award *in the same court* is, we say again, to throw consistency to the winds. To *increase* that award, however, is not even understandable.

We submit that the award to the Inter Island Company should be *very greatly* reduced and we do not venture to express our opinion as to the amount of such reduction.

IV.

THE SERVICES OF THE "ARCONA".

The lower court fixed the value of *all* the salvage services in this case at \$30,000 (VIII, 3373), correctly

holding that a total amount must be fixed and the amounts due to salvors making no claim then deducted.

See

The Elmbank, 69 Fed. 104, 109;

The Tregurno, 50 Fed. 946, 951;

Guffey Petroleum Co. v. Borison, 211 Fed. 594, 602;

Evans v. The Charles, 8 Fed. Cas. 838, 841-2;

The Blackwell, 10 Wall. 1, 15;

24 *Encyc. Law*, 1221.

Then, without considering the services of Captain Macauley who, according to the court, "was on duty throughout, and was the guiding spirit in the operations", and whose services were "of special value" (VIII, 3374), the court proceeds to apportion \$500 to the "Arcona", leaving the balance to the other salvors. There was here clear error in not making a deduction on account of Captain Macauley's services (*The Elmbank*, supra), and we note and ask correction of that error in passing, although it is not worth special treatment. Our contention now to be considered, however, is that the proposed award to the "Arcona" was wholly inadequate. We do not, however, wish to enmesh the court with the vast mass of evidence on the subject of her services, and we shall try to deal with the question briefly and in a broad way.

It is true that the "Arcona" did not proceed to the scene of operations till Wednesday noon, but her captain had been out before that to examine the situation, and had given very sound advice on Monday to

put out a stern anchor (Schroeder, I, 385; Connemann, II, 419; Macauley, VI, 2335-36),—advice which was not followed solely because of Captain Miller's delay. We do not think the "Arcona" should be seriously criticized for not going out in the first instance, as the lower court criticized her. She was a foreign warship and is not to be treated in the same light as an ordinary salvor, and it was perfectly proper for her to wait in the hope that the other salvors would succeed in releasing the ship and, after they had apparently failed, she consented to come out. The attitude of libelants is peculiar. In one breath they accuse her of delay in rendering assistance, while, on the other hand, they complain bitterly of her coming at all and depriving them of a part of their legitimate gains. It will not surprise the court to be told that Captain Miller was the principal witness who took the latter attitude (see Miller, V, 1691).

According to Captain Schroeder of the "Arcona", after she attached her first wire to the "Celtic Chief", her engines were put at slow speed and the revolutions gradually increased until, at a speed of eight knots, the wire broke (I, 383), and the lower court's findings are corroborative of this evidence (VIII, 3358). This made it evident that it was best not to use her propellers in aiding the stranded ship in her then condition, and they were not thereafter used. It is also admitted that, after failing to get a long wire aboard the "Celtic Chief", two smaller wires were made fast, and at about 6 P. M. she began operations again with the use of her winch and by heaving on her anchor

chains (VIII, 3358; 3362-63). A very vast amount of evidence was taken as to whether her lines were thereafter kept taut, and whether she really heaved on her anchor chains. Her officers and those of the "Celtic Chief" testified to a very great strain on her lines at all times after six o'clock (see Schroeder, I, 383, 386, 387, 388, 398; Connemann, II, 423, 425; Henry, I, 131, 140, 190; Lowry, I, 273, 274, 298, 303, 304, 306; Brisco, I, 325, 327), while, of course, the Inter Island witnesses and the Miller witnesses testify to the contrary.

The lower court's finding is, however, that the "Arcona's" lines were kept fairly taut and that she did heave on her anchor chain to a certain extent (VIII, 3363). The finding is not as favorable to the "Arcona" as we think it ought to be, but it is evident that this court will hardly disturb it in view of the voluminous evidence on the point. In substance the court's further finding was that, as the "Arcona" was only exerting force through her winch's heaving on her anchor chain, her aid could only have been small because the "Helene" had heavier anchors down (i. e., heavier when the weight of the chain is also added), was using her propellers and, therefore, must have exerted greater power (VIII, 3363-64). The court's further remark that the "Helene's" anchors were farther out and, therefore, had better holding power is met by the fact that the "Arcona's" anchor held fast and that hence its "holding power" was amply sufficient.

We submit, in view of the court's very favorable findings as to the great effectiveness of the "Helene's"

anchors on the ship, the "Arcona" must also have at least *a share* of the credit for holding the ship in place, if there is in fact any credit to be given to anyone on that score. It must also be remembered that the "Arcona" was present at the critical period in the operations when the ship was being made lighter in her bed. We believe that the Miller anchor was quite sufficient to hold her fast at this time, but, if we are wrong in this, and if the "Helene" is to be given credit for that service, then the "Arcona" is entitled to share, and share largely, in that credit. In this connection we would like to have it noted that on Wednesday afternoon, for at least an hour, the "Helene" stopped her engines and yet she was still able to keep her lines taut by heaving on her anchor chain (Nelson, VII, 2820), and we would also point out that the "Helene" was not using her propellers when the "Celtic Chief" came off the reef (Id. 2831).^{*} According to Haglund, she acted as "a mooring" to hold the "Celtic Chief" (VII, 2894). This evidence speaks volumes for the effectiveness of the method finally adopted by the "Arcona" in rendering assistance.

Much evidence was taken in the case as to the position of the "Arcona's" anchor. Our evidence tends to show that it was placed directly astern and almost in a line with the "Celtic Chief", while the Inter

^{*} Although this testimony will bear the possible construction that the pulling ceased only after the ship came off the reef, we believe that the above interpretation of it is correct. The engineer on watch at the time was not called as a witness and the attempted excuse for his non-production is feeble (VII, 2856).

Island witnesses placed it close to the "Mikahala". The court's findings on this subject are in the nature of a compromise between these two positions (VIII, 3360-61), and under the circumstances, without going into the exact position of the anchor, we are satisfied to quote the following testimony of Captain Haglund, superintendent of the Inter Island Company, to show that the anchor was finally placed in the best possible position:

Mr. WARREN. I will direct it to specific instances. You have testified, Captain, that the "Arcona", on coming out, first dropped her anchor at a point about directly astern or in line with the stern of the "Celtic Chief", and about midway between the "Helene" and the "Mikahala"? Now, basing your answer upon your experience in navigation, seamanship, and salvage and such manoeuver, what can you say as to the seamanship of that manoeuver in so placing that anchor?

* * * * *

A. In my opinion, there was very poor judgment shown for the commander of the "Arcona" to direct his anchor so far to leeward.

Q. Why?

A. Because he couldn't get into position that he desired, and had already spoken for.

Q. If the "Arcona" had desired and intended to so place its anchors and place itself in a position opposite the stern of the "Celtic Chief" and approximately midway between the "Helene" and the "Mikahala", where should she have dropped her anchor?

* * * * *

A. *About the place that it dropped it the second time (VIII, 2963).*

If our evidence on this subject is incorrect we are pretty well satisfied with the above admission of Captain Haglund.

The evidence in the case clearly establishes that the "Arcona" at all times maintained a position directly ahead of the "Celtic Chief", and as the current and swell struck her on her port bow and quarter (VIII, 3350) it would seem clear that there *must* have been a considerable strain on her lines or she would have swung out of line. However, as we have said before, we do not feel like going behind the court's decision on this point to the effect that the lines were fairly taut and heaving in on the anchor chain was done to a certain extent.

The testimony also is unanimous that the "Celtic Chief" came off the reef in the direction of the "Arcona" and not in the direction of the "Helene". It would seem to us that, if the "Helene" was exerting the stronger pull, as the court found, the ship would naturally have shifted her position towards the "Helene" rather than the "Arcona", but she did not do so. Of course, we also recognize that it may have been the Miller anchor rather than the "Arcona" that brought her in that direction, but, if so, it still remains true that the services of the "Helene" have been overestimated by the court.

The lower court found in this case, as we have already pointed out, that the floating of the "Celtic Chief" was due mainly to the lightering which put her "afloat or so nearly afloat that her moving was

comparatively easy". If this finding is correct, as we admit on this appeal, then all that was necessary was to have a powerful vessel on the scene with a strain on her lines, and if, as the court also found, the "Arcona" *did* have a strain on her lines, she certainly had *something* to do with pulling the ship off the reef, however little merit that service may have possessed.

The "Arcona" performed two other services of considerable merit in the salvage operations. According to the court, at "about 8 o'clock she turned on her two large searchlights, *which afforded a favorable condition for the salvage operations during the rest of the evening*" (VIII, 3358; see also Kennedy, II, 762; Mason, III, 902; Clarke, III, 1048, 1109; Makalena, IV, 1289, 1291; Dowsett, VI, 2115). Dowsett, one of the Inter Island directors, said that it made things as light as day so that he could almost have taken a photograph (VI, 2115). There can be no doubt whatever that these searchlights materially aided the operations on Wednesday evening, especially the lightering operations. We do not claim that any very great merit attached to *the performance* of this service. But the point is that the "Arcona" *had* these valuable searchlights and *the other vessels did not have them*. She was, therefore, to this extent at least, a more potent salving agency than they were, and should be rewarded accordingly. Yet we wonder how much of the award of \$500 went to compensate her for this service.

Another valuable service performed by the "Arcona" was in towing the "Celtic Chief" out of her position

of danger after she was floated. It is no easy matter to tow a vessel *by the stern*, and yet the court, instead of giving *any* credit to this service, criticizes the "Arcona" for taking her too far and finally turning her over to the "Mikahala" (VIII, 3366). It may be that the "Arcona" did take her too far, and that she *might*, despite the unfavorable conditions of the towing, have herself brought the "Celtic Chief" to a safe anchorage, but the point we wish to make is that she towed her away from her dangerous situation, and that, while this was not a service of great merit, it at least entitled her to *some* reward.

Another fact to be noted is that, with the coming of this large and powerful cruiser to the scene of operations, all danger to the "Celtic Chief", and all doubts as to its final rescue, must have been largely eliminated. Irrespective of what service she *actually* performed, it is plain that she could have, *if necessary*, exerted more power than all the other salving agents combined. While this fact bears rather on the amount to be awarded to the other vessels than to the "Arcona", we state it here as something at least proper to consider in fixing her award.

Enough has been said, we believe, to show that the proposed award of \$500 (*one-sixtieth* of the total award) to the "Arcona" was grossly inadequate. We cannot help but feel that, if she had been a *local vessel* instead of a German cruiser, and had she been making a salvage claim, the lower court would have more liberally compensated her service. Admitting, in view

of the court's findings, that her assistance was not vital, she *did* render some assistance which deserved more than a beggarly compensation. And, if it was right to consider the *value* of the other salving agencies, should not the far greater value of the "Arcona" be also considered?

It is respectfully submitted that the "Arcona's" quantum of the award should be greatly increased, and that all of the other awards should be proportionately reduced.

V.

EXCESSIVENESS OF THE TOTAL AWARD.

The lower court found that the services of the salvaging agents in this case were reasonably worth \$30,000 (VIII, 3373), from which it deducted \$500 for the services of the "Arcona" and *nothing* for Captain Macauley; leaving a balance of \$29,500 for the various libelants. To this amount was added a total sum of \$3411.77 for extra expenses (VIII, 3377, 3382), which would usually be included in a general award, thus making the total award to the libelants \$32,911.77, or approximately 25% of the value of the salvaged property. We have not taken into consideration the \$900 deducted on account of Captain Miller's misconduct, as we are now dealing with the total award as if there were no misconduct involved.

It is not necessary to burden the court with a general discussion of the principles on which salvage com-

pensation is based. These are stated as follows by this court in the case of *The Flotbek*, 118 Fed. 954, 957:

“(1) The labor expended by the salvors in rendering the salvage service. (2) The promptitude, skill and energy displayed in rendering the service and saving the property. (3) The value of the property employed by the salvors in rendering the service, and the danger to which such property was exposed. (4) The risk incurred by the salvors in securing the property from the impending peril. (5) The value of the property saved. (6) The degree of danger from which the property was rescued.”

The presence or absence of most of these elements has already been discussed and we have tried to show that the services performed were most ordinary ones, consisting of mere towing and lightering and the laying of a single anchor, both delay and negligence characterizing the last named service. As regards the element of *skill* we need do no more than cite the court's opinion “*that what was effected on Wednesday night might as well have been done at high tide, and more safely by daylight high tide, at least a day, and possibly more earlier*” (VIII, 3370). We have also endeavored to show that the value of salving vessels can only be appreciably considered when they are at risk, and they were not at risk in this case. The duration of the operations was less than three days and it should not have been as long.

The value of the salvaged property was \$134,559 and, while the lower court apparently attempted to make an award on a percentage basis (VIII, 3373), it is

submitted that in a case of such large values said method was improper.

Pope v. The Sapphire, 19 Fed. Cas. 1044, 1046;
The Philah, Id. 494, 495-6;
The Gambetta, 74 Fed. 259, 261;
The Coya, 108 Fed. 413, 415.

See also:

Hughes Admiralty, p. 138;
Kennedy on Civil Salvage, p. 124;
24 Encyc. Law, 1210;
The Suliste, 5 Fed. 99, 102;
The Baker, 25 Fed. 771, 774;
The Rita, 62 Fed. 761;
Ulster S. S. Co. v. Cape Fear etc. Co., 94 Fed. 214, 221;
The Elm Branch, 106 Fed. 952, 955.

As said in *The Gambetta*, supra:

“The exact value of the property saved, where large, is but a minor element in computing salvage and as it increases the rate per cent given is rapidly reduced. It is compensation for actual services rendered, and a reasonable gratuity for the benefit of commerce, that is contemplated, and not a fixed percentage of the property saved.”

We have not said much as to the danger to the “Celtic Chief” and admit that she was in very considerable danger, as no vessel on a reef is safe and one can never tell what may happen. We do not think, however, that the award should be greatly enhanced because of the fact that storms were to be expected at the time of year in question (VIII, 3350), there

being no storms in fact, and the weather being very moderate and the sea calm during the whole period of operations. As said in *The Alexandra*, 104 Fed. 904, 911:

“Nothing seems to be better settled in the law of salvage than that courts, in making their awards, shall be governed by conditions actually prevailing at the time when the service was rendered; that merely apprehended or possible dangers are speculative and apt to be misleading.”

See also:

The Emulous, Fed. Cas. No. 4,480;

Spencer v. The Charles Avery, Fed. Cas. No. 13,232.

Another principle to be borne in mind in relation to the danger to the salved property is that large awards are not favored near large harbors where other assistance is at hand.

24 *Encyc. Law*, 1211-1212;

The Monticello, 81 Fed. 211;

The Roman Prince, 88 Fed. 336.

In the case at bar the services of the “Arcona” were always available and, had the other salvors deserted the ship, she alone, with her great power, could and would undoubtedly have saved her. It is not a case where there was no chance of getting other aid. Moreover, all the salvors were operating from their home port and their work was thus performed at a minimum of inconvenience to them.

We now propose to lay before the court a few salvage cases, which may be of assistance in fixing the

award, although we recognize that each case must be decided mainly on its own facts. Larger percentages than that allowed in the case at bar have, of course, been allowed in cases of salvage of derelicts or of prolonged labor attended by great danger to the salvors, or cases where the value of the salvaged property was so small that a suitable award could only be made by the giving of a large percentage. But, in cases of large values, such as those involved in the present case, and where the salvors ran no risk save that involved in lightering cargo (if even *that* risk was incurred), we have found no cases coming within even approximate nearness to the present award. We shall endeavor to confine the authorities cited to cases only of stranding where the salvaged value was \$100,000 or over, and we shall not refer to cases of operations of lengthy duration involving great risk to salvors, such as *The Sandringham*, 10 Fed. 556; *The Queen of the Pacific*, 21 Fed. 459; *The Kimberley*, 40 Fed. 289; *The City of Worcester*, 42 Fed. 913; *The Tregurno*, 50 Fed. 946, and *The St. Paul*, 82 Fed. 104. A casual examination of these and similar cases show how far they differ from the case at bar. In *The City of Worcester*, supra, where a service superior in every way to that in the case at bar was involved, an award of \$32,971.52 was made on a salvaged value of \$337,500, whereas in this case \$32,914.77 was allowed on a value of \$134,559,—a striking commentary.

In going over the salvage authorities in the federal reports, we have found five cases which either bear a close resemblance to the case at bar or show so

many similar aspects as to be worth referring to and analyzing briefly. A few other helpful cases of strandings (but not so strongly in point) will also be appended with simply a statement of the salved value and the amount of the award in each case. Opposing counsel may say that the cases cited are not analogous, but we challenge them to produce cases on their part which are *as* analogous, confining themselves, of course, to cases of large values and brief operations. We do not believe *a single case* can be found lending any justification to the award in the case at bar.

The case of *The Hesper*, 18 Fed. 696, has already been sufficiently alluded to in other parts of this brief. It involved towing and lightering services lasting three days, and also the laying of a heavy anchor, presenting many other similarities to the case at bar. \$4,200 was awarded on a salved value of \$106,500. It is quite true that the salving agencies were of far less value than in the case at bar, but we believe we have shown that this is a very minor element in the absence of risk to the salvors.

In *Baker Salvage Co. v. The Excelsior*, 19 Fed. 436, the head note sufficiently sets forth the case and reads as follows:

“A large passenger and freight steamer, worth \$150,000, having a cargo worth \$10,000, was run into by a tug, which stove a hole in her hull, some six by eight feet in size, causing her to fill with water, and she was beached on Hampton bar, in Hampton Roads. Salvors were telegraphed for, to Norfolk, who came with wrecking steamers, schooner, steam-tugs, pumps, and diving and wrecking apparatus. A diver went down, and, with plank and

canvas, battened the hole. Pumps were then set to work, which emptied the hull of the water. The cargo was all got off without loss or damage. The steamer was floated, and towed 12 miles into port at Norfolk. All further injury to the steamer or her machinery was prevented. It was in December, and a severe storm from the eastward could have wrecked the steamer. None occurred, and the work of the salvors was accomplished within 48 hours. Held, that the service was a salvage service, and that the reward should bear some relation to the value of the property saved. Six thousand dollars decreed."

The court also finds that no other adequate assistance was available and lays considerable stress on this fact (Id. p. 441). It would seem that the services rendered in that case were *at least* as meritorious as those in the case at bar, and the case differs only in the smaller value of the salving agencies. Of course, the large value of the Inter Island vessels merits *some* consideration from a standpoint of *the value of their use and the expenses incurred in maintaining them*, although *not their value at risk*. Perhaps, therefore, a larger award should be made for *the total service* in this case than in the case cited, but not, we submit, an award *over five times as great* on a smaller salved value.

In the case of *The Niagara*, 89 Fed. 1000, a steamer worth \$125,000 stranded on Colorado Shoals in the harbor of Santiago de Cuba, and, after four days of service, the steamer Mamaluke, 325 feet long and with a gross tonage of 2668, and the tug Colon succeeded in pulling her off. "During the several attempts made *every available means* to move the Niagara were used, and several hawsers were broken" (p. 1001). There

was also some lightering done by both vessels. The Mamaluke, on account of her size, experienced embarrassment in maneuvering in a narrow channel, and was in some danger of striking the rocks on the shoal, and she suffered considerable damage to her machinery. As regards the Colon (a tug, no doubt, much like the "Intrepid"), the court said:

"Her service was comparatively small; her power was far less than the Mamaluke's; and her risks from her small size and light draft, were much inferior. She devoted, however, several days to the work, and lost one of her regular trips with freight and passengers."

The court awarded \$7,100.84 to the Mamaluke, and \$815 to the Colon, making a total award of \$7,915.84 on a salved value of \$125,000. The value of the salvaging agencies in this case undoubtedly come close to the values in the case at bar, outside the "Arcona", and those values were much more material because they were subjected to risk. The court also points out that no other assistance was available. We submit that the services in question were *fully as meritorious* as those in the case at bar, where the award was *four times as great* on a salved value only slightly exceeding the value of the Niagara.

In *The Alexandra*, 104 Fed. 904, the last head note which sufficiently sets out the case reads as follows:

"A steamship grounded upon a reef off the Florida Keys. Her value with cargo and freight was from \$200,000 to \$225,000. She was rescued by libelants, who were licensed wreckers, without injury, and with the loss of but a small part in value of her cargo, which was jettisoned. She was off a lonely part of the coast, 90 miles from

Key West, and there was considerable danger from storms at that season, although the weather was fair during the two days occupied in the salvage operations. Libelants employed in the service some 18 or 19 wrecking sloops and schooners, valued at about \$27,000, and 120 to 130 men, who unloaded upon the wrecking vessels, as lighters, 130 tons of cargo, which was afterwards reloaded, and jettisoned about 130 tons of lumber. They were also aided on the second day, for a few hours, by a tug valued at \$35,000. The service was attended by no great risk of life or property. The vessel was once floated and again grounded, and there was some evidence that the master wrecker was in part in fault for the second grounding, which rendered the services of the tug necessary. Held, that an award of \$11,500 was proper, to cover all the services."

In this case also the lack of other available assistance was commented on, the court saying of the wreckers that "these men are the only hope of succor to the unhappy mariner" (p. 911). Here, again, the value of the salving ships was less than in the case at bar, but the salved value was far greater and the award was about *one-third* as large.

The last case which we wish to analyze is that of *The Loch Garve*, 182 Fed. 519, with which this court is thoroughly familiar, and which has already been sufficiently commented on in this brief. Similar services were performed by the Inter Island vessels and the "Intrepid" to those performed in this case, the difference being that they were performed sixty miles from home on a desolate coast and at some considerable danger to the salvors. The added fact that the captain of the "Loch Garve" was drunk and his crew

riotous, and that for this reason Captain Haglund of the Inter Island Company had to take charge of the operations should also again be noted. The salving values were slightly less and the salved value somewhat more than in this case. \$12,500 was there awarded to the Inter Island Company as "a very liberal sum" for the use of four steamers (Id. 525), and \$4,000 to the "Intrepid". We cannot but believe that this award was too large and that this court, if sitting as a court of first instance, would not have allowed as much. In any event it forms no justification for a *greater* award in the case at bar, where the salvors were operating from their home port, and were subjected to no risk except in lightering. We submit that a *far smaller award* should be given in this case than in the "Loch Garve" case, especially to the "Intrepid".

We also cite the following other cases of strandings:

	Value of Salved Property	Amount of Award	
<i>The Rajasthan</i> , Swabey 171,	\$200,000	\$2500	
<i>Baker v. Hemmenway</i> , 2 Fed. Cas. 463,	500,000	1200	(to 2 o salvor
<i>The Swiftsure</i> , 4 Fed. 463,	125,000	2500	
<i>The Cassandra Adams</i> , 30 Fed. 379,	200,000	3500	(to 1 o salvor
<i>The Excelsior</i> , 48 Fed. 749,	150,000	700	
<i>Ulster S. S. Co. v. Cape Fear etc. Co.</i> , 94 Fed. 214,	300,000	6500	
<i>The James Turpie</i> , 113 Fed. 700,	157,000	7850	
<i>The Apache</i> , 124 Fed. 905,	300,000	3000	(to 2 o salvor
<i>The Devonian</i> , 150 Fed. 831,	800,000	4500	
<i>The Western Star</i> , 157 Fed. 489,	257,000	5150	

We, of course, cannot tell at this writing what cases libelants will rely on, or indeed whether they will not take the *safer* course of citing no cases at all. It seems fair, under the circumstances, to refer to the cases of salvage awards relied on by the Inter Island Company in its brief in the lower court (presumably the most favorable it could find), which will be briefly commented on in the order in which they were cited below.

The Thornley, 98 Fed. 735. The salved value in this case was \$105,000 and a contract entered into between the parties, without duress and against the wishes of the salvor, for the payment of \$20,000, was enforced. The vessel was aground on a dangerous reef for three days, being strained and leaking. She had a cargo of explosives on board involving risk to the salvors, there being "great risking of life". The services included the saving of a jettisoned cargo, on which, of course, a large percentage would have been allowed. The court held that "the amount of the contract was not as unreasonable as to demand that it be set aside on that account". We cannot see that the case is in any way in point.

The Annie Leland, Fed. Cas. No. 421. \$2,600 was allowed on a salved value of \$11,000. The crew was already dismantling the ship and was about to *abandon* her when the salvors arrived. Moreover, as already pointed out, the percentage of the award is much greater in cases of *small* salved values. We submit that no cases of awards, where the value was under \$100,000, are in point.

The Lyman M. Law, 122 Fed. 816. \$12,000 was awarded on a salved value of \$23,500, the salving agencies being worth \$459,667. This was a case of a *derelect*, where an award of 50% is usual and justifiable, especially where the salved value is small.

The Howard, Fed. Cas. No. 6752a. 25% was held a proper award on a salved value of \$35,391, and was reduced for misconduct. The court lays great stress on the fact that the services were performed by professional wreckers at great risk and peril. It was also a case of a wreck on the Florida coast where large awards are usually made. The salved value is too small to make the case in any way in point.

The Edith L. Allen, 122 Fed. 729. An award of \$6,500 plus the cost of repairs to one of the tugs was allowed on a salved value of \$32,500. The vessel was stranded on the New Jersey coast, she leaked and had several feet of water in her, a strong gale prevailed, the salving service was attended with serious danger and one of the tugs was damaged to the extent of \$1700. The salved value is again too small to make the case material.

The Ellen Hood, Fed. Cas. No. 4377. \$20,500 was allowed on a salved value of \$192,391. The stranded ship was on an exposed and perilous coast. Ten vessels were employed in the operations, many of them being in charge of licensed wreckers. The service lasted two weeks. Much lightering was done and several anchors laid out and heaved on. But for the assistance of the salvors the master would have had to jettison cargo

worth \$46,608. This case was decided in 1855 when awards were much higher than they are now. The salved value was very much larger than in the case at bar, the duration of the services was longer, and the award was considerably less.

The Dunreggan, 1 Estee (Hawaii) 19. This vessel stranded off Diamond Head near Honolulu and was in immediate danger of total loss, suffering damage to the extent of \$25,000. She was pulled off by three salving vessels after a day and a half. The salvors were in some danger towing in shallow water and displayed "more or less bravery". It was *admitted* by the libelee that the "Fearless", one of the salvors, "largely prevented the stranded vessel from going broadside on the reef and thus becoming a total wreck" (p. 26). The court held that a reasonable compensation for all three vessels (two making no claim) would be \$12,000 on a salved value of \$94,366.59. We think an examination of the case (which was not appealed) will clearly show that the award was too high, but in no event does it justify the award in the case at bar.

The Penobscot, 103 Fed. 205. \$2,000 was awarded in this case on a salved value of \$11,750. The ship was on a shoal at the mouth of the Cape Fear River, and her crew was about to abandon her. The salvage services, though not of long duration, were performed at some risk. The salved value is again too small to make the case material.

We believe that merely a casual examination of the above cases, cited by libelants in the lower court, not only lends no justification whatever to the very large amount awarded in the case at bar, but that these cases taken by *themselves alone* clearly demonstrate that the award was excessive. Considering all the facts of the case, apart from any misconduct, we submit that the total amount awarded does not do justice to the salved property and should not be countenanced by this court. It is our contention that, even had there been no misconduct, an award of 10% of the value of the property salved would have been extremely liberal, and it would have been greater than the proportion awarded in any of the analogous cases cited by us, except that of the "*Loch Garve*".

We would further call attention to the fact that salvage awards in Hawaii have been noticeably large, and in each instance (so far as we are aware) where they have been reviewed in this court they have been reduced.

Pac. Mail S. S. Co. v. Com. Pac. Cable Co., 173 Fed. 28;

Pac. Mail S. S. Co. v. Waimanalo Sugar Co., 181 Fed. 927;

The Loch Garve, 182 Fed. 519.

Apparently the lessons taught by these cases have not yet been driven home, and we submit that, until they are, salvors in Hawaii will continue to treat a stranded ship as "a prize of war and not a friend in distress" (29 Fed. Cas. at p. 790).

VI.

Conclusion.

It is now submitted upon the whole case that all of the three decrees appealed from should be reversed, that the awards to the Miller Salvage Company and the Matson Navigation Company should be declared forfeited, that the award to the Inter Island Company should be very greatly reduced, and that appellants should recover their costs on appeal.

Dated, San Francisco,

October 22, 1914.

Respectfully submitted,

E. B. McCLANAHAN,

S. H. DERBY,

Proctors for Appellants.

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No. 2426

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.
IN ADMIRALTY.

The British Ship "CELTIC CHIEF," Her Tackle,
etc., and JOHN HENRY, Master and Claimant
Thereof, Appellants,

vs.

INTER-ISLAND STEAM NAVIGATION COM-
PANY, LIMITED, an Hawaiian Corporation,
Owner of the Steamers "HELENE," "MIKA-
HALA," "LIKELIKE," and "MAUNA KEA,"
for Itself, the Officers and Crews of Said Steam-
ers and Other Servants of Said Owners,
Appellee.

The British Ship "CELTIC CHIEF," Her Tackle,
etc., and JOHN HENRY, Master and Claimant
Thereof, Appellants,

vs.

MILLER SALVAGE COMPANY, LIMITED, a Cor-
poration, Appellee.

and

The British Ship "CELTIC CHIEF," Her Tackle,
etc., and JOHN HENRY, Master and Claimant
Thereof, Appellants,

vs.

MATSON NAVIGATION COMPANY, a California
Corporation, Owner of the Tug "INTREPID,"
for Itself and the Officers and Crew of Said Tug,
Appellee.

REPLY BRIEF OF MILLER SALVAGE CO., LIMITED, APPELLEE.

Appeal from the United States District Court for
the Territory of Hawaii

PHILIP L. WEAVER,
502 Stangenwald Building, Honolulu, T. H.,
Proctor for Miller Salvage Co., Ltd., Ap-
pellee.

JAN 11 1914

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Thereof,

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for Itself and the Officers and Crew of Said Tug,

Appellee.

**REPLY BRIEF OF MILLER SALVAGE COMPANY,
LIMITED, APPELLEE.**

STATEMENT OF THE CASE IN PART.

The appellee has not had the benefit of seeing the brief of the appellants, before writing this brief in Honolulu. Rule 24 allows the attorneys to wait till ten days before the day set for hearing before serving a copy of the brief on the opposing counsel. This gives no time to the attorneys in Honolulu to see and reply to the same. Consequently it will be necessary to state, as best we can, the facts which should not be omitted in a statement of the case from the point of view of the Miller Salvage Company, Limited, which is referred to hereafter as the Salvage Company. It will not be possible to merely supplement the statement of the appellants.

The "Celtic Chief" was a British ship which went ashore about a half mile west of the entrance channel into Honolulu Harbor on Monday morning, December 6th, 1909. She remained ashore until about midnight of Wednesday, December 8th, 1909. Her beam was about 40 feet.

When she was pulled off, she was in a comparatively undamaged condition. She had one of her plates dented. (See Testimony of Capt. Henry, transcript page 145.) A small amount of damage was done to a mast and to a rail by the efforts of the salvors other than the Salvage Co. The cargo was not damaged in the vessel. A small amount of damage was done in lightering the bags of fertilizer, which formed the bulk of her cargo, by reason of bags broken in hoisting them out of the vessel and upon lighters alongside the ship as she lay in the

exposed position on the coral bottom or reef. This amounted to only \$1441 out of a cargo of \$111,000. (Tr., p. 3372.)

The value of the vessel is no longer a subject of controversy. The value of the cargo is as stated in the decision without any contradicting testimony.

The sum of \$1400 expended by the Miller Salvage Co. in hiring men, and providing for them, is uncontradicted. The finding of the judge is amply supported by the evidence. (Tr., p. 3375.)

A part of the case, which appellee surmises will not be adequately stated by the appellant in its brief, is that relating to the cause which led Captain Miller of the Salvage Co. to begin lightering the cargo of the "Celtic Chief." When Captain Miller, manager of the Salvage Co., boarded the "Celtic Chief" on Monday morning, he had an interview with Captain Henry, in which the latter insisted upon Captain Miller using his apparatus to lighter the cargo from the vessel. Captain Miller pointed out the danger of this procedure, but was ordered to lighter the vessel. (See Tr., pages 132 for Capt. Henry, and 1351 for Capt. Miller.) Captain Miller worked all Monday with his men and vessels, and up to Tuesday morning when he had them loaded. Then he brought the vessels and men into the harbor and landed the cargo. Captain Miller, in the mean time, had noted the effect of the lightering of the vessel, to be to allow her to go further on the reef with the assistance of the swell from the stern. (See Tr., pages 1352, 1355.) Captain Miller advised and urged that he be allowed to bring out his heavy 10,000-pound anchor and moor it astern of the stranded vessel, and that a cable be attached thereto and brought to the stern of the "Celtic Chief" to hold her while lightering was going

on. Miller had worked in Florida waters, where it was a rule of court that an anchor should be run out before lightering of a vessel.

In *Dalcoath*, D. C., 16 Fed. 2064.

(Tr., pages 1355, 1547, 1552.) Miller failed to come back with the lighters on Tuesday. He was busy getting ready the heavy anchor and the cable and tackle with which to hold the stranded vessel. He was not willing to go on lightering, because of the danger. He offered his services to Captain Henry on Tuesday, in the way of apparatus and men to hold the vessel to an heavy anchor and to keep a strain on the line. Captain Henry accepted these services. (Tr., page 1356.) Captain Henry was not satisfied with the position in which Captain Miller put his anchor on Tuesday night, and ordered him to remove it and put it in another position more directly astern. (Tr., pages 133, 1356.) It took all the daylight hours of Wednesday to get the tackle rigged and taut, by which Captain Miller expected to exert a strain on the "Celtic Chief." When he had accomplished this, he had a triple purchase rigged on the deck of the "Celtic Chief," the last fall of which could be led around the capstan manned by his men, or to the steam winch, if not in use.

The steam winch, however, was being used by the Inter-Island Co. in conducting the lightering operations, which they undertook upon the discontinuance of such by the Salvage Co. A steel cable $2\frac{1}{4}$ inches in diameter ran from the anchor to the stern of the "Celtic Chief," where a hawser was bent on a few feet from the stern. The hawser was 12 inches in circumference. (Tr., pages 133, 1395.)

The new 12-inch manila hawser had a tensile strength of at least 65,000 pounds. (Tr., page 1398.)

This stern line extended 800 feet astern of the "Celtic Chief" to the anchor. The anchor held fast, being caught on the back of a rock. (Testimony of Loncke, p. 501.) The depth of the water at the anchor was six fathoms. (Miller, Tr., page 1630.) It was a gradually sloping bottom. The line was dead astern. The Salvage Co. kept a heavy strain upon the anchor line through the wharf chock of the "Celtic Chief" where the purchase tackle rigged was over the poop deck. There is ample evidence to the effect that this line was very taut. (See Testimony of Loncke, page 480; Henry, pages 134, 156; Clarke, page 1046; Mason, page 897.) It was kept taut from the time it was first rendered so, till the vessel began to move astern.

The tide was rising from 6 p. m. on Wednesday, till the vessel came off. All this time the stern line of the Salvage Co. was kept taut, by the efforts of the men at the capstan, exerting a strain through a triple purchase tackle, upon a very heavy anchor fixed in the bed of the ocean. The anchor was held from moving home by a mass of coral reef. (See Testimony of Bray, Tr., page 722; Loncke, page 501; Miller, page 1403.) The dimensions of the anchor were 10 feet from fluke to fluke, with an 18-foot stock, shank 14 feet. (Tr., pages 461, 462.)

The Salvage Company was keeping a strain on the stern line, as the line slackened. (See Testimony of Loncke, Tr., pages 465, 474; Clarke, the foreman, pages 1032, 1033, 1038, 1046; Mason, pages 895, 896, 897, 917; Bray, page 855.)

There was no other agency pulling on the stranded vessel which had a straight, taut line to a fixed, immovable object. Every other agency was dependent upon the factor of a floating vessel on the line be-

tween the stranded vessel and the point of pull. While the Salvage Company kept its stern line "taut as a fiddle string" (Tr., page 897), and while the tide was rising and the cargo was being lightered, the purchase tackles, which were rigged on the "Celtic Chief" and by means of which the line was kept taut, dropped on deck.

This was the indication that the ship was coming off. (See Testimony of Clarke, Tr., page 1038; Mason, pages 911, 917; Weisbarth, page 595; Loncke, page 481.)

The point in dispute is the claim by the appellee that the ship began to move before the signals to begin pulling hard were run up on the "Celtic Chief."

The Salvage Co. was, at that time, exerting a continuous strain on the "Celtic Chief" from a fixed and immovable anchor, by means of a hawser and tackles capable of enduring a strain of 30 to 40 tons. Sixty men were sometimes at work at the capstan taking in slack. (Tr., page 895.)

The capstan was a differential gear pattern.

While this strain was being exerted, the other vessels were holding their lines to the "Celtic Chief," making no special exertion until the tide should be high (high tide large 1.7 feet at 2 a. m., Thursday morning, December 9, 1909), when a second and third red light should go up in the rigging of the "Celtic Chief" to indicate that special exertions to pull the stranded vessel off were then to be made by all the vessels having lines to her. The evidence to sustain the libellee's view is found among other places in the following testimony: Clarke, page 1038; Mason, page 910; Loncke, pages 480, 481; Miller, pages 1389, 1391; Henry, page 140; Weisbarth, page 595.

The ship was stranded on a coral reef which had

large lava rocks in the sea bottom. It was aground for part of its length only; the current from east to west tended to force the ship broadside on the reef. The force of the breakers astern tended to force her broadside on the reef on one or the other side. The time of year and the condition of the weather threatened a hard blow from the south, which would tend to force the vessel broadside on the reef and destroy her.

The reef tended to pierce her bilge and cause total loss to her cargo, as well as the vessel.

THE ARGUMENT.

Appellant has alleged seventeen errors, as committed by the lower court. It is not possible at the time of preparing this brief to know what errors are relied upon, therefore all the possible contentions of the appellant must be imagined and discussed at the risk of unduly lengthening the brief.

The first assignment, which attacks the whole judgment, will be discussed last.

FIRST.

(Assignment Error 3.)

THERE IS AMPLE EVIDENCE TO SUSTAIN THE FINDING THAT LIBELLANT'S VESSELS AND EMPLOYEES RAN A MATERIAL RISK WHILE ENGAGED IN THE SALVAGE SERVICE, GREATLY OUT OF THE ORDINARY. THEREFORE ASSIGNMENT NO. 3 IS NOT WELL TAKEN.

The conclusions of the trial judge who heard the

witnesses will not be reversed upon appeal, unless there is a decided preponderance of evidence against the view taken by the trial judge, or a mistake is clearly shown. 1 Cyc. 904.

The evidence was clearly sufficient to sustain the decision. The evidence as to the weather and dangerous position runs all through the testimony. It may serve a useful purpose to point out a few places only which would sustain the decision. A few samples of the testimony alone show the character of the weather which was endured, and the risk. (Loncke, Tr., pages 443, 445, 446, 447, 448, 449; Mason, Tr., page 906; Bray, Tr., page 713; Weisbarth, Tr., pages 571-2; Macaulay, Tr., page 2217.)

SECOND.

The alleged errors under numbers 3, 4, 5 and 6 may be treated together.

THERE IS MORE THAN SUFFICIENT EVIDENCE TO SUPPORT THE FINDING OF THE TRIAL JUDGE THAT (ASSIGNMENT NO. 2) THERE WAS GREAT DANGER OF TOTAL DESTRUCTION OF THE VESSEL AND THAT THE APPELLEE TOOK AN APPRECIABLE PART IN THE SALVAGE;

(ASSIGNMENT NO. 4) THAT THE SERVICES WERE SUBSTANTIAL; AND INDISPENSABLE AND NOT OF MINOR IMPORTANCE;

(ASSIGNMENT NO. 5) THAT THE SALVAGE COMPANY GAVE MATERIAL AID IN PREVENTING THE VESSEL FROM GOING BROADSIDE ON THE REEF, OR IN RENDERING HER MORE SAFE IN HER POSITION ON THE REEF;

(ASSIGNMENT NO. 6) THAT THE COMPANY

WAS ENTITLED TO AN AWARD FOR MERITORIOUS SALVAGE SERVICES, AS DISTINGUISHED FROM MERE LIGHTERAGE SERVICES.

(a) *THE VESSEL AND CARGO WERE IN GREAT DANGER.* (Loncke, Tr., pages 474, 475, 476; Capt. Miller, pages 1403, 1404, 1449; Tom Mason, page 908; Weisbarth, page 572; Bray, page 713; Macaulay, pages 2183, 2194-8, 2203, 2217; see opinion, page 3352.)

The cargo of fertilizer was particularly perishable in sea water.

(b) The findings objected to by assignments 4, 5 and 6 are supported by the evidence running all through libellant's case. The trial court must have believed the evidence to be true in order to have awarded a share equal to about a quarter of the salvage to the libellant.

Libellant believes, however, that the true view of the facts will support its claim that the libellant was not only of material aid, but also the chief factor in floating the "Celtic Chief." That the other agencies prevented the ship from going broadside on the reef, and assisted in lightering the cargo, but that the Salvage Co.'s anchor and tackle really played the leading part. It is contended that the facts show that after the Salvage Co. got its line taut on Wednesday, no other assistance was necessary, except such as the "Likelike" performed in towing the "Celtic Chief" into the harbor. The "Arcona" was only a lumbering pretentious nuisance to everyone, and to the Salvage Co. in particular, whose anchor buoy it cut loose and damaged.

The libellee says that neither it nor Captain Miller was guilty of negligence or misconduct.

The assignment of errors 7, 12, 13 and 15 refer to this claim.

The alleged error 7 is based upon a claim of disputed fact. It is claimed that Captain Miller's award should be diminished for lack of skill in lightering the cargo of the vessel before anchors had been put out to prevent her drifting.

Captain Miller ought to turn in his grave at the monstrous injustice attempted to be perpetrated upon his memory by the Machiavellian tactics adopted by the appellant. The trial court reproved this attitude of the appellant. (Tr., page 3370.)

Captain Miller protested to Captain Henry that the ship ought not to be lightered till there was an anchor out astern. (See Tr., pages 1350-6, 1547.) Captain Henry insisted that the vessels towing on her could hold her. Miller was ordered to do the lightering, against his protest. When he saw that the lightering was having the dangerous result he predicted, he took his lighters in Tuesday morning and did not bring them out again.

Captain Henry disputes this. But that is because he saw his mistake and tried to lie out of it. Is it reasonable to suppose that Captain Miller would prefer to do lightering under the circumstances? Captain Miller's action spoke louder than words when he failed to return to lighter. He merely did what he thought best, and no longer acted under the Captain's mistaken ideas. Captain Henry's testimony is discredited, because he tried to get and did get the Inter-Island Co. to lighter his cargo immediately upon finding out that Miller was not coming back with the lighters. All the testimony fits with the idea of Captain Miller.

(See Captain Henry's testimony, page 132; see opinion, page 3369.)

Alleged errors 12 and 13 are based on the claims that the entire award to the appellee, the Salvage Company, should have been forfeited, by reason of what the appellant is pleased to call misconduct of Captain Miller, its superintendent, and of the company.

Captain Miller was never guilty of any misconduct. The most has been made of a feeling of rivalry to get the vessel off quickly and efficiently. Captain Miller believed that he could pull the vessel off himself with his cable attached to a fixed anchor, without any other help, *AND WAS DOING SO*.

(See Tr., pages 1360, 1361, 1367.)

He was a man specially skilled in salvage work. (See Tr., pages 1366, 1367.) He wished to demonstrate this fact. Appellee claims that a reading of the whole case, with all its disputes, shows that the real effective agency which pulled the "Celtic Chief" off the reef was the strain kept on the Salvage Company's line to a fixed anchor, while the tide was rising and the swells were lifting the "Celtic Chief."

The other vessels were useful to take charge after she was afloat, and ample arrangement for making signals was made to prevent any trouble, from lack of knowledge of when she was coming off.

As a matter of fact, the witnesses on the stranded vessel felt the bump, when she first began to move. To talk of concealment in any serious manner is only clouding up the issues to escape paying a fair reward to the salvor. It was a piece of bi-play in what Miller called an "*opera buffet*." He told the pilot he would pull the vessel off in half an hour (page 360). It is not worthy of serious consideration. The frivo-

lous horseplay about bumping the stern of the "Celtic Chief" into the stern of the "Arcona" to show that she was not pulling, would be too trivial to consider had not the judge of the trial court considered the matter.

It is talking about using a sailing vessel stern end first as one would use a pebble on an elastic and shoot it accurately through the water 800 feet away at an object which subtends an angle made by an object 60 feet wide in an 800-feet radius. To anyone, who seriously considers this fact, or diagrams the attempt, it becomes clearly an absurdity to try. In his playful way, Miller said he was going to do it. He never intended to injure the "Celtic Chief." He stated he thought the damage would be trivial and he would pay for any damage done. He was in a playful, boisterous mood and said these things, but when actions are considered, was there anything which could have hurried his men which was not done to encourage the men under Miller? They were working for double time and in relays, with a rivalry excited by Miller to get the work done effectively. Was not this the best way to get results?

Further, the cases do not bear out the contention that Miller was blameworthy and the Salvage Company should suffer, for not informing Captain Henry that he believed the ship was coming off the reef when they heard the first bump in the cabin of the "Celtic Chief." No harm was done the vessel, and the vessel was pulled off sooner than the others expected to have her pulled off, because of Miller's efficient means. Captain Miller's conduct was not blameworthy.

The case which approaches nearest the one at bar is "The Birdie," Federal Cases, No. 1431, page 438. This overruled a lower court, which found the sup-

pression of information reprehensible. We submit that nothing was left undone by Miller to pull the vessel off, which he could have done. He believed that the other agencies were useless at that time. They had performed their function of holding the vessel from going broadside on the reef until he had gotten out a stern anchor and line sufficient to hold the vessel against the swells approaching the "Celtic Chief" from the stern.

The cases which the libelee may cite, depending upon the premises that the ship was brought into greater danger by the acts of the libelee, do not apply to the case at bar.

The claim that the ship was brought into greater danger by the Salvage Company's lightering her on Monday, comes with bad grace from Captain Henry, who ordered the work done against the advice of Miller. (See opinion, page 3369 of transcript.)

Miller gave way to the opinion of Henry when Henry ordered the anchor placed astern of the "Celtic Chief"; there was a difference of opinion as to where the anchor should be placed, and the master's orders governed.

The true rule applicable is found in *Western Transfer Co. v. Great Western*, Fed. Cases, No. 17443, page 78:

"A reduction will be more or less in proportion to the misconduct, whether slight or aggravated, and the degree of injury or inconvenience, resulting therefrom to those interested in the property."

In the case at bar there was no real misconduct; it was mere boisterous play, which resulted in spurring the men up to extra exertion on account of the rivalry. The result was all in favor of a quicker rescue. There was no inconvenience resulting. There

was only a grand success, in rescuing the vessel, practically undamaged, with the cargo damaged only in the work of lightering.

The "Likelike" stood ready to take charge upon the signal that the vessel was coming off and all was well prearranged. There was no danger to the "Celtic Chief." Miller never intended that any real damage should be done her. He was only anxious to demonstrate that he was doing the work, even if he approached the "Arcona" in the proof of it.

The most is made of this point because of the strategy of the appellant. If it can establish that Miller and the "Arcona" did practically all the work, then the way is clear to get out of paying for what was done for appellant. The "Arcona" makes no claim. Then, if the claim of the Salvage Company can be cut out entirely because of the by-play of Miller, being magnified into something substantial, a brilliant victory is recorded to the counsel. The benefit has been received and the rescuers go unrewarded. This is the spirit of the appellant, who complains of misconduct on the part of Miller. Perhaps it is different if the misconduct is "within the law." But such conduct is not to be encouraged in a court where equity rules govern.

As to assignment of error No. 13, based upon the claim that Miller wilfully gave false testimony, it is plain that the trial court, who saw the witnesses, did not so consider the testimony. (See opinion, page 3369.)

Such a claim comes with ill grace from the ship whose master testified that Captain Miller did not wish to put out an anchor when he first went out to the vessel. The deliberate lie was perceived by the trial judge, and the circumstances helped to expose

the master's trickery. By this lie, he was able to claim that Miller's reward should be cut down, for faulty methods of salvage.

By assignment of error No. 15, the appellant claims that the appellee showed a selfish and calculating spirit.

The trial judge did not find that to be the case. The testimony shows that the Salvage Company used extraordinary energy to assist the vessel in distress, not in any selfish and calculating spirit, but in a spirit of rivalry. The same selfish and calculating spirit is shown when the rival baseball clubs try to win a pennant for the best play. It was a play of skill and the best method proved itself; now, it is sought to claim that the Salvage Company was not doing its utmost to pull the vessel off. The facts show and the trial court found that the Salvage Company was a substantial element of the rescue. The alleged selfishness was only sportsmanlike rivalry and not blameworthy. The healthy rivalry was not discouraged in the case of "The Birdie" above cited.

It is elementary that the law appeals to self-interest, as a means to encourage salvors. (Benedict's Admiralty, 4th Ed., page 173.)

A certain amount of rivalry is encouraged by the policy of the law. Appellee claims this rule has not been exceeded.

FOURTH.

(Assignment of Error No. 8.)

The award of \$30,000, or 17½ per cent on the value of the vessel and cargo saved (see opinion, Tr., page 3373), was not an excessive percentage considering the danger in which the vessel lay and the fact that

she was saved substantially unharmed after three days of determined effort; and the danger to the men landing cargo under such circumstances. (See opinion, Tr., pages 3348 to 3352, 3370, 3371, for description of the danger.)

The vessel was lying where lava rocks are among the coral reefs. She was not ashore her whole length, but only partly ashore. Capt. Miller says she was free on her shore end and fixed aft. The swell was causing her to bump. Her cargo was perishable in sea water. She was going further in-shore in spite of towing vessels. Without the towing vessels she would have gone broadside on, she would have been bilged, and the cargo of fertilizer lost. She was being lightered under dangerous circumstances till the Salvage Co. held her.

FIFTH.

(Assignment of Error No. 9.)

The court was simply justified in finding the value of (a) libellant's vessels, and (b) of the "Celtic Chief."

Miller knew what the vessels were worth to him in his business and showed that they were worth that much to him, as constituting a going concern.

The assessed value for taxation purposes is hardly the value of the property of a going concern, but much less. The court cut down the value of five vessels, including two steamers, to \$10,000, for he values the tackle and anchor at \$12,000. (Tr., page 1418.)

This is a great and unwarranted reduction. The "Concord" alone was worth \$3000 as a schooner. That left \$7000 for the other four vessels. The allowance should have been much more. Even three-quarters

of the value would not have been an unfair allowance to the appellee. \$33,000 for all appliances and apparatus held for use in such emergencies is only reasonable.

SIXTH.

(Assignment of Error No. 10.)

The opinion of the court (Tr., page 3366) shows why the services of the "Arcona" were not substantial and indispensable. The opinion is amply justified from the facts of the case.

The heavy anchor at a fixed point, behind a rock, with a strong line running to purchase tackle, is infinitely more effective than any steamer riding at anchor with the steam winch taking in the slack on the anchor, and attempting to hold a stranded vessel. There is not the rigidity of the pull in the latter case. The "Arcona" was not pulling at the time the "Celtic Chief" came off. She was waiting for a signal to pull.

SEVENTH.

(Assignment of Error No. 11.)

THE OPINION OF THE TRIAL JUDGE GIVES AMPLE REASON, FOUNDED ON SUFFICIENT TESTIMONY, WHY THE "CELTIC CHIEF" WOULD HAVE COME FREE WITHOUT THE SERVICES OF THE "ARCONA."

Libellant claims that the line of the Miller Salvage Co., run out directly astern, held taut by the purchase tackle to a fixed and immovable anchor of 5 tons weight, with its flukes against a lava rock, was sufficient alone without other agencies to hold the "Celtic Chief" in place while the tide was rising and the

“Celtic Chief” was being lightened by the removal of her cargo.

This is the fundamental reason why the Miller Salvage Co. was right in claiming \$20,000 for salvage or two-thirds of the amount, which the trial judge awarded. It seems unjust to penalize the libellant by awarding costs against it, in the light of the award found fairly due by the trial judge. The belief of the libellant that it was the most effective agency was well founded in its opinion, in the light of the evidence that all the other agencies together had no such fixed point upon which to get a grip and exert a great strain without elasticity due to the buoyancy of vessels on the line of strain.

This belief, founded upon the evidence, and the fact that the court found \$30,000 a reasonable sum to award as a whole, show that the libellant was justified in asking for \$20,000. It had reasonable ground to believe and does believe that it is entitled to such award. The claim should not be held to be so excessive as to demand the payment of costs, especially when the trial court found that a total claim of \$30,000 was reasonable.

It is not just to add the claims together and say they are unfair when combined, for they overlap. If the libellant was the chief agency, then they were entitled to \$20,000. If the Inter-Island Company was the chief agency, they were entitled to the greater sum, and the Salvage Co. to less. The claims together represent conflicting claims, because of disagreement as to shares of the work done. It is unfair to punish libellant for making a fair claim, based upon a reasonable view of the case, even if not sustained by the trial court. The decree as to costs should be modified.

EIGHTH.

(Assignment of Error No. 16.)

THE COURT WAS RIGHT IN ALLOWING INTEREST FROM THE TERM OF THE COMPLETION OF THE SALVAGE SERVICES.

The allowance of interest by way of damage is in the discretion of the courts.

1 Cyc. 891.

Citing *The Steamboat Swallow*, 23 Fed. 13, 665.

NINTH.

The award of \$8000 in favor of libellant was warranted by the evidence. In fact, the evidence would support a larger award up to \$20,000 claimed by the libellant. It is entirely a reasonable view that the lightering operations of the Salvage Co. and the pulling done on the heavy anchor entitle the libellant to two-thirds of the credit for the successful rescue of the vessel. The only substantial benefit of the other vessels was to hold the ship from going broadside on, and to help pull when the time came to make the attempt, with some lightering done, as well. None of their lines held the vessel with a rigid line, when the swells lifted her.

There is a manifest error in the decree of the trial court, in awarding to the foreman and men of the Salvage Company and other servants of the owner, the sum of \$1500 to be taken out of the share of the Salvage Company.

The men were engaged for this job. They were

paid by the day, having been gathered up on the waterfront for this particular job at \$2 a day for a common laborer, with 50 cents an hour overtime. Most of the men were engaged for this particular purpose. They had a pre-existing duty to do just that particular work on the "Celtic Chief," and received high wages and a big allowance of overtime for their work. Apart from the impracticability of finding these men four years after the work was done, or even finding out the true names of certain particular Japanese or Hawaiians put on the list with scores of others in the early morning of Monday, December 6, 1909, there is no rule in Admiralty which gives special salvage to such men.

See

Kennedy on Civil Salvage, 25, 26.

The *Solway Prince*, 8 Aspinwall's Maritime Reports (new series) 128, 130; citing *The Neptune*, 1 Hagg. 227; *The Hannibal*, L. R. 2 A. & E. 53; *The Cetewayo*, 9 Fed. 717.

The latter case indicates the rule as applied to the crews of a wrecking vessel, employed by the month, whose duty was not to do salvage work. That illustrates how far the rule goes. It points out how the case at bar is distinguished from one where the crew should receive compensation.

A just award should be given libellants. The costs should not be taxed against the libellants.

Respectfully submitted,

PHILIP L. WEAVER,

Proctor for Miller Salvage Co., Ltd.,
Appellee.

IN THE United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

3

The British Ship "CELTIC CHIEF," Her
Tackle, etc., and JOHN HENRY, Master
and Claimant Thereof, Appellants,

vs.

INTER-ISLAND STEAM NAVIGATION
COMPANY, LIMITED, an Hawaiian Cor-
poration, Owner of the Steamers "HEL-
ENE," "MIKAHALA," "LIKELIKE," and
"MAUNA KEA," for Itself, the Officers and
Crews of said Steamers and other Servants
of Said Owners, Appellee.

The British Ship "CELTIC CHIEF," Her
Tackle, etc., and JOHN HENRY, Master
and Claimant Thereof, Appellants,

vs.

MILLER SALVAGE COMPANY, LIMIT-
ED, a Corporation, Appellee.

The British Ship "CELTIC CHIEF," Her
Tackle, etc., and JOHN HENRY, Master
and Claimant Thereof, Appellants,

vs.

MATSON NAVIGATION COMPANY, a
California Corporation, Owner of the Tug
"INTREPID," for Itself and the Officers
and Crew of Said Tug, Appellee.

BRIEF FOR APPELLEES

INTER-ISLAND STEAM NAVIGATION CO. LTD., and MATSON NAVIGATION CO.

W. O. SMITH,
L. J. WARREN,
CHARLES P. EELLS,
W. H. ORRICK,

Proctors for said Appellees.

Filed the day of November, 1914.

F. D. MONCKTON, *Clerk.*

By Deputy Clerk.

INDEX

	Pages.
STATEMENT OF THE CASE	2
Claims of the Matson Navigation Co.....	4
Claims of the Inter-Island Steam Navigation Co....	4
Claims of the Celtic Chief	5
Description of the Celtic Chief	6
ARGUMENT	6
Danger to the Ship	7
The Reef (Kind)	7
The Reef (Bottom Contour)	8
Weather Conditions	8
Condition of the Sea	10
Direction of Swell	11
Height of Swell	11
Force of Swell	14
Frequency of Swell	14
Effect on the Ship	15
Current	22, 29
Danger of Going Broadside	24
The Ship "Moving In"	30
Danger to the Cargo	33
THE CASE FOR THE "INTREPID"	35
Getting on the Line	35
Pulling by the Intrepid	37
Danger to the Intrepid	42
Cutting of the Intrepid's Line	43
Standing By	49
OPERATIONS OF THE INTER-ISLAND COM- PANY	50
Promptitude	50
Lightering	51
The Ship's Winch	53
The Donkey-barge	54
Danger With Small Boats	55, 63
Danger to Men	63
Depth of Water	59
Sling Work	63
Night Work	65
Operations of Steamers	68
Mauna Kea	68

	Pages.
Mikahala	73
Helene	78
Likeline	94
Combined Pulling Wednesday Night	96
Lack of Knowledge of Certain Witnesses.....	96
Weight of Towing Vessels as Factor	103
Jerking	104
“Five-Ton Block” Theory	106
Effective Horse-Powers	106
A “Straight” Line	110
Danger to Steamers	111
Summary	114
Competency and System.....	114
Lightering	115
Arcona Interference	116
Signals	116
Floating of the Ship	117
Mikahala’s Work	117
Standing By	119
OPERATIONS OF THE “ARCONA”	121
Appellant’s Contentions	121
Attitude of Arcona’s Commander	123
First Going Out to Ship	126
Afternoon’s Maneuvers	126
Final Position Taken	131
“Testing” Her Wires	133
Efforts With Big Hawser	134
Two Wires Finally Run	138
Evening Operations	140
Alleged Pulling, Ship’s Witnesses	142
Alleged Pulling, Libellants’ Witnesses	147
Did Not Use Propellers	161
Did Not Heave on Anchor	163
Maximum Power Possible	172
Did Not Intend to Pull That Night	175
Towing the Ship to Sea	178
Casting Off at Sea	179
Confusion, Lack of Skill and Seamanship	187
OPERATIONS OF THE MILLER SALVAGE COM- PANY	188
Detrimental Work	188
Lightering	189
Anchor Operations	190

	Pages.
Delay	190
Misplacement	191
Rigging of Tackle	192
Limitations on Tackle Power	192
Strength of Line	198
Weight of Anchor	198
Holding Power	198
Value of Equipment	199
INACTIVITY ON SHIP'S PART	200
Warning Unheeded Before Stranding	201
Ship's Crew No Aid	202
SUCCESS.	
How the Ship Came Off	182
Ship and Cargo Saved Without Material Injury	203
The Effective Service	204
Opinion of Macaulay	205
Opinion of Haglund	206
CREDIBILITY OF WITNESSES	206
Schraeder	207
Connemann	209
Henry	209
Macaulay	211
Clarke	212
Haglund	212
Piltz	213
AMOUNT OF AWARD	213
Basis of, By Trial Court	213
"Lighterage" and "Towage" Basis	214
Argument for Encouragement	216
Precedents	218
The Hesper	220
The Manchuria	224
The Loch Garve	226
Penalty of Costs	229
Inter-Island and Matson Awards	231
Separate Allowance of Extra Expense	232
Notes in Reply	232

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

The British Ship "CELTIC CHIEF," her
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Appellants,

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The British Ship "CELTIC CHIEF," Her
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Appellants,

vs.

MATSON NAVIGATION COMPANY, a
California Corporation, Owner of the Tug
"INTREPID," for Itself and the Officers
and Crew of Said Tug,

Appellee.

No. 2426

BRIEF FOR APPELLEES, INTER-ISLAND
STEAM NAVIGATION COMPANY, LIM-
ITED, AND MATSON NAVIGATION
COMPANY, LIMITED.

STATEMENT OF THE CASE.

The British Ship "Celtic Chief" (for which we will hereafter use the term "Ship"), on a voyage from Hamburg laden with a cargo of fertilizer and a small quantity of marbles and liquor, arrived off Honolulu on the evening of Sunday, December 5th, 1909, and went ashore late that night upon the reef between Kalihi Bay and Quarantine Island. The causes and manner of her stranding will appear from the evidence as cited in this brief when pertinent to any point under discussion.

The further facts of the case, relating to the salvaging of the vessel and cargo, are more or less in dispute between the parties. Each salvor claims to have been the principal agency in the salvaging, and on the other hand the libellee claims that the German cruiser "Arcona" did the most work.*

The several causes come before this Court upon the consolidated appeals of the libellee, alleging that the awards of salvage made to the respective salvors, as stated in the judgment of the Court, are excessive.

* At the end of this brief we have noted briefly a few of the more material points where we would differ from Appellants' statement of the case.

We are, ourselves, of the opinion that in view of the accepted finding of the trial Court that the aggregate value of the salvaged property was \$134,559 (Tr., p. 3372), the allowance of a total salvage award of \$30,000 was not excessive. This included an allowance for interest at six per cent for the three and one-half years which had elapsed since the services were rendered. (Tr., p. 3373.)

If the allowance of \$30,000 as salvage to all of the salvors collectively be regarded as fair, the Court will further go into the matter of its apportionment between the respective salvors. This involves directly the relative value of the services performed by each. It is the contention of the Inter-Island Steam Navigation Company and the Matson Navigation Company that if the apportionment of the aggregate award is to be reopened, no allowance whatever should have been or be made for the services of the German cruiser "Arcona" and that too large an allowance, \$8,000.00, was made to the Miller Salvage Company. That the work of the Miller Salvage Company did not at best entitle it to an award of more than a nominal sum, and that the larger part of the award heretofore allowed the Miller Salvage Company plus the \$500 credited to the "Arcona," should have been and should be fairly apportioned between and added to the amounts allowed the Inter-Island Company and the Matson Navigation Company.

CLAIMS OF THE MATSON NAVIGATION COMPANY.

In brief, it is the claim of the Matson Navigation Company, owner of the steam tug "Intrepid" that this tug (aside from a gasoline launch), was the first vessel to put a line on the Ship, at a time which was without question the most critical after she was once on the reef, and that the service rendered by the Intrepid during the several hours from the time she took hold, and until other assistance arrived and made assurance doubly sure, undoubtedly saved the Ship from going broadside on the reef, the fact being uncontrovertible that had she gone broadside the salving of her would have been far more difficult if not impossible. Alone, the Intrepid was unable to pull the ship from the reef, although able to hold her stern up against the action of the swell and to better the condition of the Ship. The Intrepid further remained and pulled on the Ship, in conjunction with the other agencies, until cut loose to meet a condition imposed by the commander of the German cruiser "Arcona."

CLAIMS OF THE INTER-ISLAND STEAM NAVIGATION COMPANY, LIMITED.

It is the claim on the part of the Libellant, the Inter-Island Steam Navigation Company, Limited, that through its hazardous lightering operations, and those of the Miller Salvage Company, Limited, far less hazardous, and the pulling on the Ship by the Inter-Island

steamers, aided in some degree by an anchor placed astern by the Miller Salvage Company, and the rising of the tide, the Ship was floated without serious damage to either Ship or cargo. It is the further claim of all the Libellants in the consolidated cases, that the cruiser "Arcona" did not have any effective part whatever in the salving of the Ship.

THE CLAIMS OF THE SHIP.

As is often the case when a government vessel has been present at salving operations, the claim is made that the greatest service was rendered by the government vessel, obviously because of a desire to have as large a part of the award as possible credited to the agency which will take no salvage, thus reducing as far as possible the credit to the agencies to whom real compensation must be made.

It is likewise claimed by the libellee that the Ship was not in any danger and was comfortable enough; that she was within easy reach of assistance; that an unlimited amount of assistance could have been had; and that it would have been only a matter of time before, by some simple operations, the Ship would have come off, herself and her cargo intact.

It will be observed, of course, that the libels of the Inter-Island Steam Navigation Company and Matson Navigation Company are filed on their own behalf and that of their respective officers and crews and other servants.

In this brief the numbers in parentheses refer to the page numbers of the printed transcript. In some instances the names of the witnesses are also given, as we believe that sooner or later, in considering the credibility of witnesses, the Court will attach more or less value to such references.

As a description of the conditions bearing upon the situation of this vessel ashore will aid an understanding of portions of testimony which will be cited throughout the case, as well as indicate the danger to the Ship and her cargo, we will present these features of the case preliminarily.

A detailed description of the Ship appears in the decision of the trial Judge, on page 3372 of the transcript. In addition to this we mention that her floating draft, when laden to water line, as she was on this voyage, was 21 feet aft and 20 feet 10 inches forward (Henry, Tr., p. 251; Macaulay, Tr., p. 2195).

ARGUMENT.

There being three separate assignments of errors, by reason of the separate decrees entered in the Court below, it will not be expedient to attempt to discuss them separately. As to some of them a consideration of the whole record will be necessary, while others will be referred to more or less out of their sequence.

DANGER TO THE STRANDED VESSEL AND CARGO.

As against the specification of error (No. 2 in each case), that there was little or no danger to the stranded property, we present the following descriptions of the reef on which the vessel was aground, the conditions of the weather and sea, and their effect on the vessel:

THE REEF: (Kind)

Capt. Henry: "Soft coral and sand." (Henry Depn., Tr., p. 143).

Capt. Macaulay: "Sand and coral. Big patch of sand, then a hummock of coral sticking out here and there in patches, all in that neighborhood" (Tr., p. 2202). "Boulders of coral" (Tr., p. 2395). "Knew it was coral because coral when crushed discolors the water, making a milky surface" (Tr., p. 2202).

Capt. Miller: "Coral and lava rocks" (Tr., p. 1403).

Capt. Piltz: "A hard coral bottom" (Tr., p. 1953). "Indicated as hard because the water was milky" (Tr., p. 1953).

Capt. Nelson: "White water indicates that coral is being ground up" (Tr., p. 2788).

Capt. Haglund: "Judged it was coral being ground up on account of the milky color" (Tr., p. 2908).

Lowry: Judged the bottom to be sand and soft coral because the tallow on his lead line brought up some sand and "small flakes of coral rock" (Tr., p. 281). We would say that might indicate some *loose* coral—but why "soft?"

Lonche: "Hard coral rock" (Tr., p. 530). "Sand and black rocks in it" (Tr., p. 550).

Bray: "Pretty hard kind of coral" (Tr., p. 722).

Weisbarth: "Few little boulders here and there" (Tr., p. 656).

THE REEF: (Bottom Contour):

Lonche: "Pretty level, generally running up, an incline" (Tr., p. 550).

Weisbarth: "Fairly level, a gradual grade" (Tr., p. 657).

Macaulay: "The ship was on the outer edge of the reef. In that locality the reef runs in ledges. The outer ledge rises abruptly, then goes on a plane with very little grade, say, for 1000 feet, then comes to another little ledge of coral from 2 to 4 feet high, then that runs on a plane" (Tr., pp. 1533-4).

We think the Court will be justified in finding the reef to be a dangerous one, precisely as was found in the case of the *Chiusa Maru*, reported in 3 U. S. Dist. Ct. Rep. 361, as the decision there indicates that the testimony was much the same, and the fact being that the two vessels went ashore at points very near each other, and several of the same persons have testified as witnesses in both cases.

Weather Conditions:

The time of the stranding was in December, practically the very middle of the season in which southerly storms are liable to come. Referring to the case of the "*Chiusa Maru*" and the summary of the evidence and finding of this Court with respect to weather conditions and the consequent danger, we think that a case of considerably greater danger to libellee is made out in the cause at hand, as the swell in the present case was apparently greater, and the weather was not only in the season of southerly storms but the weather was

southerly at the time. Quoting from the decision in the *Chiusa Maru*, found on page 361 of Vol. 3 of the decisions of this Court, we think our case comes squarely within the same judicial knowledge of the Court:

“It is in the testimony that at the time of year at which she stranded, winds from the south, southwest and southeast are liable to occur and that in such weather she would be on a lea shore exposed to the open sea. *It is a matter of general knowledge in these islands that such is the case and the Court does not hesitate to take judicial knowledge of this fact.* Vessels have been driven ashore on the reef near the harbor at different times by southerly gales and totally wrecked. *Such storms are liable at any time from the 1st of October to the last of March,* and with such weather coming on, salvage operations would have quickly become impossible, and it would have taken but a few hours to have entirely wrecked the libellee.” (Italics ours.)

The *Chiusa Maru* stranded very near the harbor, as did the *Celtic Chief*. In the former case the weather was not *bad*, any more than in the case at bar, and there was even less danger of it in that case than here because here the weather was largely southerly.

Looking to the testimony in the case before us, it appears that the weather Sunday evening, and until toward morning was showing signs of change, and the wind was variable. From a fair N. E. breeze at 7 p. m. Sunday (Macaulay, Tr., p. 2178), the barometer then being low (Tr., p. 2178), the wind died to a calm by 9 or 10 p. m. (Tr., pp. 2181, 2382, 2204), and a southerly swell began to come in (Tr., pp. 2181, 2204). By 2 a. m. Monday a land breeze sprang up (Tr., pp.

2181, 2381, 2205), but died again to a flat calm (Tr., p. 2183). Thereafter, by the weight of the testimony, the weather was southerly, and only one who has lived in Honolulu a number of years knows what southerly or "Kona" weather is. For references to southerly weather, see Henry, Tr., pp. 165, 203; Lowry, Tr., pp. 276-7, 172; Brisco, Tr., p. 329; McAllister, Tr., pp. 82, 91; Piltz, Tr., p. 1859; Haglund, Tr., p. 2958. A "Kona" prognosticated (Miller, Tr., p. 1405). It was sultry Wednesday night: "typical Southerly weather" (Lewis, Tr., p. 3237).

In the testimony the Ship's witnesses generally say the "weather was good,—or fine." We take it that to a seaman this is a comparative term,—say as distinguished from rainy or stormy weather.

Capt. Macaulay said:

"The danger was that the stranded Ship was inside the line of breakers, and the month was the month of December, liable for a heavy sea to run in there at any time" (Tr., p. 2284).

Comparing the Hamakua Coast with the place where the Celtic Chief was stranded, he said:

"Along the Hamakua Coast is very deep water and there are no sudden breakers coming in in deep water. When the weather changes on the Hamakua Coast it always gives you warning, but there is no warning given to you when you are inside the breakers on the reef on the lee side of the Island of Oahu. There is no warning" (Tr., p. 2286).

The Condition of the Sea:

A Southerly swell began coming in after midnight Sunday night (Macaulay, Tr., pp. 2382, 2404). This

began with a little swell (Tr., p. 2381) which attained greater force toward morning, and continued thereafter, varying in force during the salving operations (Tr., pp. 2383, 2405, 2286), at times considerable (Tr., p. 2382). In Capt. Macaulay's words,

"All the time the Ship was on the reef there was no day that it continued the same (Tr., p. 2381).

The direction of the swell, beginning with the time the Tug Intrepid took hold, was almost astern of the Ship but striking her a little on the starboard quarter (Weisbarth, Tr., p. 654; Kennedy, Tr., p. 748; Miller, Tr., p. 1404; Piltz, Tr., p. 1762; Nelson, Tr., pp. 2776, 2815; Macaulay, Tr., 2196.

The height of the swell varied:

Lonche: "Swellers are never the same size" (Tr., p. 448). An ordinary or moderate swell is 3 to 3½ feet (Tr., pp. 445-6). On Monday morning it was 3 or 3½ feet (Tr., p. 445). They splashed on the Ship's counter (Tr., pp. 447-8).

Watkins: (Ship's agent): Admitted there was quite a heavy swell (Tr., p. 3293).

Mason: A pretty heavy sea running Monday (Tr., pp. 906, 925).

Clarke: 6 feet high (Tr., p. 1060), and 8 to 10 feet (Tr., p. 1061).

Miller: A pretty heavy sea (Tr., p. 1403). 4 feet below and 4 feet above, or an 8-foot range, makes a "four-foot swell" (Tr., p. 1430).

It was high enough to *break* at the bow of the Ship: (Mason, Tr., p. 926; Clarke, Tr., p. 1060; Miller, Tr., p. 1428; Piltz, Tr., pp. 2010-11; Tullett, Tr., pp. 2679, 2727. And once, at *least*, a big swell broke abreast of the forehatch (Tullett, Tr., pp. 2679, 2727), and this

one was about 16 feet high (Tr., p. 2679). Others Tullett saw were from 12 to 14 feet high (Tr., p. 2679).

Capt. Piltz says that the "mean height" was 5 or 6 feet when the Mikahala went out there Monday morning (Tr., p. 1762); and during the lightering on Tuesday the boats rose 8 to 10 or 12 feet (Tr., pp. 1927, 1865-66, 1867, 1957). On Wednesday a little less,—8 to ten feet,—(equal to 4 or 5 "mean") (Tr., pp. 1865-66); and 4 to 6 feet mean (or 8 to 12 extreme range) on Monday (Tr., pp. 1866-67). See also that he said 6 to 12 (extreme) or 3 to 6 (mean) on Wednesday (Tr., p. 1957). And again 6 or 7 (mean) on Wednesday (Tr., p. 1957).

Capt. Haglund says the biggest were say 14 or 15 feet (Tr., p. 2959).

Capt. Tullett says that a swell is as high, *when it breaks*, as the water is deep at point of breaking, and that there is no other way to measure a swell (Tr., pp. 2678-79). Note also that although Tullett did not know the depth of the water at the Ship's bow (Tr., p. 2679), his estimate of the height of the swell that broke abreast of the forehatch, 16 feet, tallies with the actual depth of the water there (Tr., pp. 2192-3, 2196).

Piltz and Miller take the mean or medium between the highest and lowest extremes of the top and dip of the swell, as expressing its height. They say that a difference of 10 or 12 feet between the extremes would be a 5 or 6 foot swell (Piltz, Tr., p. 1762; Miller, Tr., pp. 1429-31).

Captain Macaulay said the swells were not over eight

feet above the *surface* on Monday (Tr., p. 2203), and "8 feet is a pretty good swell" (Tr., p. 2285). He also said "quite a nasty swell" (Tr., p. 2198). Capt. Macaulay does not count the *trough* of a swell, but only above the surface or mean sea level (Tr., pp. 2451-2).

We note, in passing, that a boat before rising on a swell, drops into the trough before and after it.

Capt. Nelson says the swells averaged 8 feet (Tr., p. 2776), and some may have been 10 or 12 feet (Tr., pp. 2776, 2816).

Capt. Henry admitted that the swell was on all day (Henry, Tr., p. 205).

Most convincing, perhaps, is the photograph, Libellant's Exhibit K, taken by Capt. Tullett Wednesday afternoon (Tr., pp. 2688-90), where by judging of the height of the vessel, which was 20 feet above the sea (Tr., p. 2688) and using parallel rulers, it was apparently 12 feet (Tr., p. 2688), which Tullett says was an average,—some larger, some smaller,—(Tr., pp. 2688, 2697-99), some perhaps 4 feet higher (Tr., p. 2689). Looking at this same photograph, Capt. Haglund estimated the height of the swell there shown at about 10 feet or a little more, giving the width of the Ship's plates and the band of white paint and the black bulwark which he knew (Tr., p. 2960).

Appellant's counsel have heretofore claimed that *Monday* was by far the roughest day of the operations. That very claim goes to accentuate the danger the Ship and cargo were in on Monday, when the *Intrepid* and *Mauna Kea* did their real work. These photographs

show, according to counsel, a lesser swell than on Monday.

The force of the swells also varied from time to time, but an idea of them will appear from the following references:

The largest swells, at least, would heave the Ship's stern up, and unquestionably the swells were the only force to cause the inward movement of the Ship on the reef. (See Lonche, Tr., p. 443; Miller, Tr., pp. 1404-5).

The swells broke 6-inch lines, bitts, rails, etc., of Miller's lightering vessels (Tr., pp. 571-2, 642, 1424, 1429-30; Henry, p. 203; Brisco, pp. 348-9).

Capt. Henry admits that Miller's lighters "jumped" around (Henry, Tr., p. 204) and had a rise and fall of 7 or 8 feet (Henry, Tr., p. 204).

And it is too evident to require any argument that if barges and vessels as large as the Concord and Kaimiloa had a rise and fall of that much, the swell itself, to move *them*, had a bigger range.

Lowry also admitted that Miller's barges "ranged" about on the swells (Lowry, Tr., pp. 276-7).

The Inter-Island boats engaged in lightering rose from 12 to 15 feet (Tullett, Tr., p. 2674).

See also, Tullett, Tr., p. 2692; and Piltz, Tr., pp. 1863-4.

In frequency of the larger swells, the testimony varies somewhat, depending, it is only fair to say, upon the idea of each individual witness as to what were the "big" swells. Capt. Haglund says: 3 to 4 and 5 minutes

apart (Tr., pp. 2960-61): Mr. Kennedy said: two or three at a time,—a long and a short (Tr., p. 748).

Mason: “three big seas” every 15 or 20 minutes Tr., p. 906).

Lowry: “about every 20 minutes or so” (Lowry, Tr., p. 282).

Brisco: said the Ship would bump five or six times in a day (Brisco, Tr., pp. 330, 342).

Capt. Macaulay said

“there was times when the swell came in heavier than other times; there would be a smooth spell of it; then without any warning there would be three heavier swells coming in, much heavier than the average swell during the day” (Tr., p. 2203).

And again:

“The sea may be perfectly smooth. All at once, and all of a sudden a roller comes in there and curls over and breaks, and if you’re close to that breaker you’re going to get capsized” (Tr., p. 2286). And see Tr., p. 2451.

It is respectfully submitted that notwithstanding the claim of the Ship in this case that the sea was smooth and there was no appreciable swell, the evidence very greatly preponderates that there was, in the opinion of quite a number of masters of long experience in the Hawaiian Islands, a considerable swell, and that in no other way could the lines of Miller’s vessels have been broken. We will proceed, however, to indicate further the evidence tending to show the danger to the Ship and cargo.

The Effect of the Swell upon the Ship, aside from the tendency to put her further ashore, was to make her rise and fall, pounding, bumping and “working” with

more or less severity, depending perhaps on the variance from time to time in the swell and the tides, and possibly by the lightering operations. We make the following references to testimony of this kind:

"Working" Lonche, Tr., pp. 443, 448).

"Not as pleasing as an earthquake" (Kennedy, Tr., p. 747).

"Severe bumps on Monday" (Kennedy, Tr. p. 818).

"She was pounding up and down, pretty hard" * * * and "pretty often" on Monday (Mason, Tr. pp. 905, 907).

"Thumping" (Miller, Tr., p. 1614; Piltz, Tr., p. 2057).

"Her rise and fall was a good three feet" (Miller, Tr., p. 1618).

"Swaying and pounding" one or two feet aft (Piltz, Tr., p. 1763).

"It wasn't a very pleasant sensation. We were in fear"—etc. (Piltz, Tr., pp. 2056-7).

"She'd start to go on her keel and then she'd roll (mostly, on her port side) * * * and grind" (Piltz, Tr., p. 2057).

"Sort of a shock" (Dowsett, Tr., p. 2153).

"Rolling; grinding; thumping" (Haglund, Tr., p. 2959).

"Pounding upon the reef rather hard" (Schroeder, Tr., p. 384).

Capt. Macaulay's testimony shows the peculiarity of the effect on the vessel and the difficulty in determining *just how* she acted. On pages 2209-10 Transcript is an incomplete report of his description. We say incomplete because a clear recollection supported also by private trial notes satisfy us the reporter missed a clause

which we will insert in brackets in our quotation below. He said:

“Well, when a heavy sea would come and strike the Ship, she would naturally rise and bump, and shake her masts and rigging and her whole hull would tremble for the time being and then she would settle down to normal.

“Q. Where on the Ship would this motion be most severe?

“A. All over the Ship; in fact I had an idea that she was striking heavier forward than she was aft and I went forward on the bow of the Ship to find out where she was striking, (and from there she seemed to be striking hardest aft). It is a pretty hard matter to locate the exact spot where she strikes the severest”—etc.

Even Captain Henry, who said that “at times” there was no swell at all (Tr., p. 163), had to admit that “two or three times she *did bump hard*” (Tr., p. 260). And Lowry admitted “bumping” (Tr., pp. 282, 287); and Brisco testified to bumping pretty hard (Brisco, Tr., pp. 330-31), and that “on Monday and Tuesday there was heavy bumping” (Tr., p. 337), and you could recognize a bump “because the whole Ship shook” (Tr., p. 347).

Capt. Schroeder is the only witness who has said that on Tuesday morning the Ship was harder aground at her stern than her bow, her stern being fast and her bow swinging from side to side with the swells (Tr., pp. 384, 391), and we submit that when he answered direct interrogatory 11 by saying that Capt. Henry told him the Ship’s draft (in deep water) was 24 feet aft and 20 feet forward (in which he was mistaken), it is

only fair to think that he had this information in mind when he said she was on harder aft, because, as indicated by his further answer to cross interrogatory 9, (Tr., p. 391), she would then have to be one meter (39 inches) deep in the reef itself.

And even Capt. Schroeder, were his testimony correct that she was harder on aft than forward, said that on his first examination on Tuesday morning he could hear "the noise of the iron bottom scraping over the corals * * * in the aft part" (Tr., p. 384). It follows from *this*, also, that if her *stern* was on hardest, and her *stern* were scraping along the bottom, she was not so hard on the reef that she wouldn't have turned broadside on Tuesday morning had she not been held.

Ideas differed as to whether or not the Ship "worked a bed in the coral." It is the idea of Ship's counsel that the vessel was merely on a sort of marine railway for the time being, in an easy bed of "soft" coral and sand (Tr., p. 2474). As to *sand*, the testimony shows there is a reef of coral the outer ledge of which rises out of deep water, and also that *on this* was some "sand," which sand, by the evidence, is merely ground-up coral. The holes and swales of the reef were doubtless filled with this sort of sand, (as the Court found with respect to this same reef in the *Chiusa Maru* case). Even sand alone might be "soft" for a ship's keel but hard for her bottom to pound upon, as water is "soft" for a dive into but "hard" for broadside entry. And the *coral* has a "certain limit to its softness," although "soft" enough

to be cut by a sharp keel was hard enough to pierce or force a ship's bottom (Macaulay, Tr., pp. 2474-5).

Witness Miller says "There was no bed worked in that reef (Tr., p. 1449). He didn't "understand that a ship's keel being in the coral is a bed for the ship. A bed for the ship would take her all in say for three or four feet up on her bilges" (Miller, Tr., p. 1619).

Piltz thought that with the Ship working as described on pages 2059, Transcript, "she would naturally kind of imbed herself with the loose coral that she would stir up, caused from the water, forming generally on the seaward side of the vessel" (Piltz, Tr., p. 2059). And if she were in that kind of a bed (broadside) it would be harder to get her off (Tr., pp. 2059-60).

Lowry thought the Ship must have worked into a bed "and seemed to be stuck pretty hard" (Tr., p. 287).

Macaulay thought the Ship's keel was imbedded about 6 inches (Tr., pp. 2345, 2389), and Miller put at from 8 to 12 inches (Tr., pp. 1618-19).

In any case she was grinding the coral, because the lime escaping from newly crushed coral is what makes the water white or "milky" (Lonche, Tr., p. 549; Haglund, Tr., p. 2908; Macaulay, Tr., pp. 2202-3; Nelson, Tr., p. 2788).

From all of the foregoing conditions affecting the Ship, taken also in connection with her manner of going ashore and her movements before assistance arrived, as below indicated, we urged upon the Court that she was in a position of very grave peril to herself and her cargo.

She is a single bottom ship (Tr., pp. 1432, 1618), and in view of the fact that she was working, grinding and continuously affected by the swell, the danger was imminent that she would go broadside, and, once broadside, she would probably have been doomed to stay there and break up. (See *Chiusa Maru case, supra*, p. 5). *How soon* she would have gone broadside "no living man could tell."

Let us here go back to the testimony of how the Ship *got on* in the first place, and her turnings and changes of position and how caused, until help arrived, as indicating her tendency of motion under the action of the swell. During the night she was in different positions (Tr., p. 2187). As to this we have the testimony of practically only one witness, although on certain points it is supplemented by others.

Passing, for the present, the testimony on pages 2174 to 2177, Transcript, as to how the Ship was actually handled, or should have been handled in the opinion of Capt. Macaulay, we find that when an anchor was finally dropped the Ship was "partly on the reef" heading to the northeast, her head being "right up in the reef," at which place the reef tended say 45° , forming a little curve, the general trend of the reef being east and west (Tr., pp. 2179, 2187), so that the Ship was "angling quarterly on to the reef" (Tr., p. 2179). By "partly on the reef" (Tr., p. 2179), Capt. Macaulay meant, apparently, vertically *over* the edge of the *ledge*, although not yet touching (see Tr., p. 2180, showing the depth then to be 26 feet, showing she was not in the deep water

which exists off the ledge), because he follows the statement on page 2179, Transcript, with the further recital that after the port anchor was dropped the starboard anchor was cleared and also let go and the Ship rode to her anchors and they hoped the breeze would keep up and she would not (actually) touch, although dangerously close (Tr., p. 2180). But a few minutes afterwards her *keel* did touch slightly several times (Tr., pp. 2180-81). It was about 9 p. m. on Sunday night that she first touched (Tr., p. 2180). Then the wind died down and a light southerly swell began soon after to come in *and inclined her in toward the reef, broadside, with her stern to the westward and her bow to the eastward* (Tr., p. 2181). Her position when she first touched is marked "C. C. I" on the sketch made by Capt. Macaulay (see Tr., p. 2188), on file as Libellant's Exhibit F (Tr., p. 2200). "Position 1" is again described on page 2188, Transcript, as "heading northeast, her stern southwest" and "the reef running east to west." In this position, and on account of the tendency to broadside, Capt. Macaulay advised taking up the port anchor, which was lying on the *reef* in 26 feet of water (Tr., p. 2180), for fear that it would pierce her bottom should she be driven over it, and this was done (Tr., p. 2181). The effort to take advantage of the land breeze failed and the Ship got back to about the same position (Tr., pp. 2180-83, 2188).

It is difficult to conceive what could have put her back again if not the incoming swell.

Under the same conditions, and with the current running to westward at a speed of from one to three knots (Tr., p. 2183), she was touching bottom again, but only occasionally, and not hard (Tr., p. 2184), and gradually "she was almost broadside on the reef," just on the outer edge (Tr., p. 2184), having worked around, her *bow* swinging from the east to (toward) the north until she got in position No. 2 (Tr., p. 2191), shown on Exhibit F, along toward daylight (Tr., p. 2184), which was her position when the *Intrepid* arrived at about 6:30 Monday morning (Tr., p. 2189). She moved this way "on account of the current and swells," the current striking her on the starboard side, the swell more quarterly than the current (Tr., p. 2192).

It will be seen by reference to the witness' answer on page 2192, Transcript ("Well, the *Intrepid* having hold of her") that the witness had carried his preceding answers as to the swell up to and past the point when the *Intrepid* took hold,—the swells and current doubtless continuing more or less the same. When directed back to her movement *prior* to the time the *Intrepid* took hold (Tr., p. 2192), he describes the same tendency of the elements, saying that they affected her *bow*, inclining her *bow* toward the north, but her starboard anchor being out she didn't move that way very *much*. Asked, then, what held her *stern* from going around, tending to throw the vessel broadside, his answer was that the *reef* held her stern (Tr., p. 2192).

Ship's counsel have tried to confuse Captain Macaulay and discredit his testimony by assuming, on cross

examination, that *because* he had testified on direct examination that the reason why the Celtic Chief was not thrown broadside on the reef before the Intrepid arrived was because her *bow* was held by her starboard anchor,—*therefore*, in moving from position 1 to position 2 her *stern* must have *swung around to the eastward*, up against the swell. (See Tr., pp. 2398-9). The witness' apparent affirmative answer to that idea, on page 2398, Transcript, must be taken with those on page 2399, Transcript, from which it is clear that in saying her stern was more eastward he meant, *not* that the stern *moved against or into* the swell, but that her *bow* had swung to the *westward* (Tr., pp. 2398-9) and, "naturally the *line of the Ship* changed and took position number two" (Tr., p. 2399); and he said, specifically, "I don't believe that her *stern* moved to the *eastward* any, but the end of her *bow*, swinging to the *westward*, *altered the bearing of the stern*" (Tr., pp. 2387-8, 2399). Plainly he meant that only the *point of direction* of the stern had changed, without the stern itself moving except by turning as caused by the bow swinging to west, the stern, on account of being deeper in the water (Tr., p. 2379), being "up *against* the reef" (Tr., pp. 2379, 2387-8) was held, while the bow, drawing less water, could move *westward* gradually (Tr., pp. 2195-6, 2387-8).

We here call attention to the further testimony of Captain Macaulay that her starboard anchor checked her somewhat from going broadside (Tr., pp. 2195, 2388); it "checked her some" (Tr., p. 2198), and "kept

her to a certain extent" (Tr., p. 2380); but she was, nevertheless, "gradually swinging her bow to the nor'ward and inclined to go farther in on the reef" (Tr., p. 2198), and (as to her stern) "the whole body of the Ship was going in farther on the reef gradually and swinging gradually to the nor'ward before the Intrepid and the Hukihuki arrived" (Tr., p. 2198); and, notwithstanding her stern was *against* and more or less then held by the reef, he said "*I fully believe she was gradually canting her stern towards the reef from the moment she stranded until assistance came from shore;*" nor did the Captain wish to redraw his diagram (Tr., p. 2397). "The Ship was never stationary until she pulled her last position" (Tr., p. 2461).

Being in position 2 when the Intrepid (and Huki) took hold at about daylight in the morning (Tr., p. 2193), Capt. Macaulay thought it would be a large advantage to get the Ship at right angles to the reef to take the sea and swell right astern as far as possible, so the starboard anchor was taken up which allowed her bow to swing further west and she assumed position 3, which was about N. 10° W. (Tr., p. 2193), which was her position thereafter, so far as *direction* is concerned. She had then moved further directly in on the reef until she was on full length with her *bow* harder on than her stern. (See Tr., pp. 475, 550, 862-3, 1451, 1615-16, 1763-4).

The gravest danger to any ship ashore is that of going broadside on the reef. The fact that this Ship *didn't* go broadside, does not mean she was not in grave *dan-*

ger of it; and danger of this kind has the element of uncertainty which makes it imperative to have immediate relief, and no man can say that she would *not* have gone any more than that she would, in any given space of time. Again the *Chiusa Maru* case is in point. We make the following further references to the testimony on this point:

In the opinion of Capt. Miller, if there had been no agencies holding the Ship, "by Wednesday night she would have been overset" (Tr., p. 1433).

When Capt. Miller said that her only tendency was to go directly on the beach, he was referring to her tendency under the conditions as they "actually occurred," and "*what it would have been without the agency of the Inter-Island boats would be another proposition*, your Honor, and I may state for the sake of information that *no ship ever remains bow to the beach* when she strikes, *unless her stern is held by an outside agency*. She is bound to swing one way or other" (Tr., p. 1432).

Captain Piltz said the effect of the swell on her starboard quarter "would drive her broadside on the beach" (Tr., p. 1762), and that "the immediate assistance that she got is what prevented her from going broadside" (Tr., pp. 1763, 1934). He further described her tendency to roll mostly on her port side, and he "never noticed that she pounded on her starboard side. There was always a lurch toward her port side then she would turn upright" (Tr., p. 2058). Also that the danger, in case of her going broadside, lay in her "pounding and knocking her bilge, and the danger of

being a total loss, the vessel going broadside on" (Tr., p. 2062).

"Eventually she would go broadside onto the reef" (Macaulay, Tr., pp. 2197-8).

"She was in danger of going broadside on the reef, getting bilged and becoming a total wreck" (Macaulay, Tr., p. 2210).

Captain Macaulay repeatedly declined to say *how long* it would have been before she *would* have gone broadside if the Intrepid and other vessels had not taken hold, even when he was asked whether it would be a matter of hours or days or weeks (Tr., p. 2211), saying that "no living man could tell the time it *would* take," but it was only a matter of time on account of the current and the swell until she would be broadside upon the reef (Tr., pp. 2211-12) * * * "*Might have been that afternoon; might have been the next day; it might have been a month*" (Tr., p. 2212).

Once broadside, "that would be the end of it" (Macaulay, Tr., p. 2215).

The "Helga" took the same reef farther on, before daylight in the morning, and before eight o'clock was "broadside on the reef and the seas washing over" (Tr., pp. 2215-16).

The effect on the Ship, if she got broadside "would be that she would be liable to get bilged, . . . her bottom pierced by the coral" by the surging leaning her over (Tr., p. 2217), and the effect on her "would be the same" even though no hole were pierced in her, because if her weight should get on her bilge on the inshore

side it would bend her plates or frame and after she would start to leak she would become water logged (Tr., p. 2217).

And her keel cutting into the coral would not have been sufficient to have prevented it (Macaulay, Tr., pp. 2389 to 2391).

To counsel's theory that a boulder might have lodged against the port side of her keel and held her, Captain Macaulay replied: "I say those boulders would have pierced the Celtic Chief and there would have been no occasion for salvage" (Tr., p. 2391). We submit that Mr. Olson's motion (Tr., p. 2391) to strike the answer as not responsive, and the trial Court's final allowance of this motion (Tr., p. 2393) was obviously erroneous. With the question, "I'm asking you if there had been some boulders there *what would have been the result?*"—and the answer, "*The result would have been* these boulders would have pierced her bottom and she would have become waterlogged,"—we cannot see how the answer is not responsive as far as it goes. In any case this witness said (Tr., pp. 2473-4) she would have been "pierced" and her bottom "forced."

The ship, under the conditions referred to on page 2402, Transcript, could *not possibly* have maintained the same position (Macaulay, Tr., p. 2402).

In the judgment of Capt. Tullett:

"She was in great danger * * * from the swells setting her around and perhaps taking the whole side out of her * * * the swells would tend to lay her on her port bilge" (Tr., p. 2682).

“In fact, they naturally always do” (go broadside, etc.) (Nelson, Tr., p. 2787).

She was even in danger of it after the towing steamers took hold, in case of anything happening to their lines (Haglund, Tr., p. 2985).

Piltz, without being able to do what no one else could do,—but which counsel thought he *ought* to do before being qualified to judge how long it would take the Ship to go broadside,—i. e. give the force of the swell in *pounds*,—nevertheless was certain “It would take *less force than was pulling on her* to turn her broadside” (Tr., p. 1844).

The question of “how long it would take,” put to Captain Piltz (Tr., p. 1807), resulted in a challenging cross-examination to prevent his giving any opinion (Tr., pp. 1807-24) and ended with an answer perfectly responsive: “with the conditions prevailing out there the first day, *it would have been less than a day*” (Tr., p. 1823).

In the opinion of Capt. Piltz the Inter-Island boats *did* prevent the Ship from going broadside (Tr., p. 1934).

See also: Weisbarth, Tr., pp. 655, 704-5; Miller, Tr., pp. 1620-21; Piltz, Tr., pp. 1645, 1807.

There was sufficient danger of it to make Miller unwilling to anchor (Miller, Tr., pp. 1681-2).

Further, as to the danger to the Ship and cargo, see: Miller, Tr., pp. 1432-33, 1620; Macaulay, Tr., pp. 2284-5, 2448; Nelson, Tr., pp. 2787-8; Haglund, Tr.,

p. 2985; McAllister, Tr., pp. 82-3, 91-2; Barrett, Tr., pp. 105-6.

Witnesses from the Ship of course endeavored to minimize the danger. Capt. Henry said she was in "no other danger" than "that of simply being aground on the reef" (Tr., pp. 142-3). Nevertheless he testified also that he was on duty continuously, and lay down only a few minutes, and had no sleep the whole time and was under a strain,—from which it is clear he was desperately worried about the safety of his Ship (Tr., p. 239). His idea that there was "no immediate danger" (Tr., p. 143) stands alone in the case. Certainly when he talked with Mr. Kennedy he "wanted all the help he could get" (Tr., p. 746).

The Current tends to the westward along this reef (Macaulay, Tr., pp. 2183, 2192), with a speed of from one to three knots (Tr., p. 2183), and affects the tide to a certain extent (Tr., p. 2710). This *also* tended to send the Ship's stern around to broadside.

The Ship was unquestionably unable to assist herself. A reading of Captain Macaulay's testimony, of how she was unable to do so, indicates only what Capt. Haglund brought out more particularly when the effort was made to show that the Ship might have brought on board a donkey engine from town to heave on her own anchors. Even then, it would have taken "all on Monday" to do it (Tr., p. 3120), and by that time the Ship would have been broadside without doubt. On Monday was the greatest danger, and Capt. Haglund says it would have taken a *day* even if the Inter-Island

Company were doing it (Tr., p. 3205). And, besides, they *tried* to unshackle one of the Ship's anchors to put it out to pull on, but were unable to do so (Macaulay, Tr., pp. 2311-12); Haglund, Tr., pp. 3096-3111, 3120). The fact is that she was going harder on the reef right along tending to broadside more at first than when assistance removed that particular danger, after which she continued to move directly in, bow on, until that also was prevented. The evidence is somewhat conflicting as to how long the Ship continued to move in, and we will review it at this point.

By the weight of the testimony, the Ship gradually moved in on the reef by the action of the swell until by Tuesday evening she was on her full length.

Lonche: "Every time one of the largest swells hit her it would heave her stern up and she would have a tendency of going further ashore all the time (Tr., p. 443). But not after Tuesday" (Tr., p. 448).

Weisbarth: "He thought 250 or 300 feet up to Wednesday morning (Tr., p. 656. But *he* didn't know about Tuesday (Tr., p. 658),—(because he wasn't there on Tuesday). Tuesday p. m. to Wednesday morning,—*only a little bit* (Tr., p. 697). 100 or 150 feet in all between his first observation on Monday and his last on Wednesday" (Tr., p. 698).

Kennedy: "*Monday night to Tuesday morning, 36 to 40 feet* (Tr., p. 759. *Tuesday morning to Tuesday night, 5 or 6 feet* (Tr., p. 759). *Tuesday night to Wednesday morning, no change*" (Tr., p. 760).

Macaulay: "The swells made her take the reef (Tr., p. 2195). The first day she moved in on first ledge sufficient to put her on full length (Tr., p.

2263). Kept going in easy on Monday (Tr., p. 2378). *Tuesday morning to Wednesday morning, 6 feet* (Tr., pp. 2279-80). *None after Wednesday morning*" (Tr., p. 2281).

Watkins: "About 70 feet from say 10 a. m. on Monday until Wednesday morning" (Tr., pp. 3287-89).

Schroeder: (Answer to Miller cross-interrog. 3 (Tr., p. 397), shows Ship did not move in *after Wednesday morning*).

Henry: Admitted that the swells "helped a little" (Tr., p. 165).

(Note: Capt Henry failed to mention the agency that the swells added to).

Lowry: Hardly 50 feet (Tr., pp. 309-10).

See also: McAllister Depn. 99; Lonche, Tr., pp. 226-7.

Conneman said 20 meters (= 65 feet) during Tuesday night (Tr., p. 424), but this would not be correct unless from Tuesday morning until Wednesday morning.

Capt. Henry claims she did *not* go further in (Tr., p. 135), but admitted on cross-examination that she may have gone in "a bit" (Tr., p. 165).

We here refer to Mr. Watkins' testimony (Tr., pp. 3288, 3301), as to having heard a discussion between Captains Macaulay and Schroeder on Wednesday morning in which Macaulay maintained that the vessel had not lost any ground. Mr. Watkins understood that this discussion related to the time from Tuesday to Wednesday. Clearly Macaulay meant that a move of *six feet* (see Tr., pp. 2279-80, 759), was not "losing ground."

Of the testimony of the several witnesses shown above, we think that that of Messrs. Kennedy, Watkins and Macaulay is most reliable. Bearings taken from on shore ought to be more dependable. Mr. Watkins had an excellent set of observation points, and his report of about 70 feet from 10 a. m. on Monday until Wednesday morning), he having made no segregation of the distance for Monday, Tuesday or Wednesday separately), is not far from Mr. Kennedy's 46 feet, in view of the fact that Mr. Watkins saw the Ship from near right angles while Mr. Kennedy thinks he may have seen her at a different angle. Then, too, it will be noted that Capt. Macaulay's *six feet* coincides with Mr. Kennedy's 5 or 6 for the time between Tuesday and Wednesday morning, (he having made no segregation of the morning) there was *no change*.

Before leaving the subject of the Ship moving in, we are aware that Capt. Miller claims it was his anchor that stopped her moving in. This will hardly be taken as the fact, when she only went in 5 or 6 feet from Tuesday to Wednesday morning, and after Wednesday morning none at all, considered in connection with the fact that he did not get any strain on his anchor line until, by the testimony of his own witnesses, in the afternoon (Clarke, Tr., p. 1032), along toward evening; Ekau said about an hour before sunset (Tr., p. 1250), and Makalena said about sunset,—about six o'clock Tr., p. 1330). Witness Lowry also said it was about 5 p. m. Tr., pp. 279, 295-6).

We would like also to note, by way of explanation, that all of the examination of Capt. Macaulay on pages 2264-2279, Transcript, was under a mistaken idea of counsel for the Inter-Island Company that Capt. Macaulay had, by the *compass* bearings taken (referred to on pages 2263-4, Transcript), calculated the distance the Ship had moved. Counsel pressed it because of confidence that Capt. Macaulay could prove himself right, but it developed that Macaulay had not meant compass bearings and that he had used *other* observations on which he based his testimony that she moved in 6 feet. Therefore the question was withdrawn (Tr., p. 2279).

It is also proper to mention, by way of some explanation of the Ship moving in on Monday in spite of the vessels pulling, that Miller's barges were fast to her on either side, not anchored but dragging on her, and increased the "striking surface" receiving the force of the swells, the entire force thus acting on the Ship itself. Miller admitted this was the case and the effect of it (Tr., pp. 1547-8).

The danger to the cargo of the Celtic Chief, lay in its being wet by the vessel springing a leak by opening her bilges or being pierced (Tr., p. 2063).

Witness Piltz ventured the opinion that the fertilizer would be destroyed by being wet, and Ship's counsel arose to impeach him on the ground that he wasn't an expert; but the witness made the point of fact that the fertilizer which got on the deck and got wet became very sticky, and considerable of it was destroyed (Tr.,

p. 2063). To rebut the idea advanced by another witness that this fertilizer would dissolve rapidly, the witness Watkins was called as an expert chemist to show that the Loch Garve cargo to which the witness had reference was nitrate of soda, which dissolves very rapidly, as equal parts of nitrate of soda and water will dissolve inside of 10 or fifteen minutes (Tr., p. 3296); but that the cargo of the Celtic Chief, being sulphate of potash and double manure salts, and not soluble so readily, (requiring 13 parts to 100 parts of water, see page 3284, Transcript), would take *longer*. *How long*, was not emphasized on the direct examination. On cross-examination, it developed it would take "at least an *hour*" (Tr., p. 3207), and if the quantity of water were *doubled* "it ought to go into solution quicker" (Tr., p. 3207), because upon her bilging she would *break* and let in all the water necessary.

It would seem to us that "old ocean" would be able to double (a few times) the 100 parts of water, and also overcome the 2% advantage fresh water has over sea water as a solvent (Tr., p. 3296). And if the Ship had opened her bottom and flooded her hold with sea water, *some* of it would be wet beyond recovery within an hour or *a day*.

And on Mr. Watkins' own statement, if the cargo were once wet and mixed, the expense of recovery would be so great that the cargo "would simply be abandoned" (Tr., p. 3299).

With the foregoing presentation of certain features of the case, by way of introduction to a consideration

of the services rendered by the different salving agencies, and their value, we proceed to our discussion of the operations themselves.

THE CASE FOR THE INTREPID.

With respect to the assignments of errors, numbers 10, 11, 12 and 13 in the Matson Company suit (Tr., pp. 3409-10), appellant claims first that the Intrepid rendered no service; second, that no success attended her efforts; third, that she was "discharged for cause;" and, finally, that because the tug did not agree to give way to the Arcona her claim for salvage should be forfeited in any event.

In reviewing the case for the Intrepid, we will deal with these claims in their order.

The Matson steam tug "Intrepid" arrived at the scene of the stranding closely following daylight on Monday morning, December 6th. The exact time of her arrival must be determined from the following testimony: Macaulay said 6:30 a. m. (Tr., p. 2189); McAllister said 7:15 a. m. (Tr., p. 81); Henry said 7:30 a. m. (Tr., p. 118); and Brisco said 8 a. m. (Tr., p. 319).

There was no "hold up." The Tug's Captain, McAllister, hailed the Ship and asked if assistance was wanted. The answer from Capt. Henry was, in his own words, "I asked him if he would *give us an offer* to tow us off" (Henry, Tr., p. 118). It was a case of "what price" at the instance of Capt. Henry himself.

Capt. McAllister, like most people who dicker in a speculative bargain, named a figure which he readily expected to cut in half,—\$20,000, and as it was declined he *did* cut it in half, and this being also declined he said *no more* about terms except this: “*leave it* and we will settle it shore.” Henry said, “I agreed to that, and then his line was passed aboard the ship.” (See Henry, Tr., pp. 118-19). This is the same in substance as testified to by McAllister (Tr., p. 90). And see Lowry, Tr., pp. 282-3. All this transpired within a very short time. McAllister said that in naming \$20,000, “I just merely spoke of it in a manner” (Tr., p. 90). McAllister didn’t stop to argue, and did not lay by while talking, but backed right in and passed his line (McAllister, Tr., pp. 90-1). Capt. Henry says also that the talk with McAllister did not take “a great deal of time,” and that from the time McAllister came alongside *until his hawser was fast* was only 10 or 20 minutes (Henry, Tr., p. 163). See also, Lowry, Tr., p. 285. Brisco said 5 or 10 minutes (Tr., p. 231). Macaulay said it was a very short time (Tr., p. 2200). Consider this in connection with the fact that McAllister had to take soundings as he approached, not knowing the draft of the Ship nor depth of the water (Barrett, Tr., pp. 102-3, 108-9), and it will be seen that McAllister did pretty rapid work, especially in view of the condition of the sea, as heretofore indicated in this brief.

Note here, from Barrett’s testimony (Tr., p. 108), that they talked for two minutes, during which he heard only the part about whether or not a line was wanted,

and then he lost the rest of the conversation because he started his engine again, backing in,—showing the tug was already getting busy, not standing on terms.

The tug's line was (in circumference) a 10 inch (Lowry, Tr., p. 283), or a 13 inch (Barrett, Tr., pp. 103, 109), or 12 or 14 inch (McAllister, Tr., pp. 85, 93) Manila, with a 1 1/8 inch diameter (Barrett, Tr., pp. 109-10), (Haglund, Tr., p. 2904), or 3 1/2 inch circumference (McAllister, Tr., p. 83; Lowry, Tr., p. 283), steel wire attached to it, having an eye spliced in the end (Lowry, Tr., p. 283; Macaulay, Tr., p. 2190; Haglund, Tr., p. 2904), the wire portion being about 50 fathoms long (Lowry, Tr., p. 265), its whole length being about 20 or 30 feet shorter than the line to the Mikahala (Tr., p. 2903), which was about 513 feet (Tr., p. 2903), making the Intrepid line about 488 feet long. Capt. Macaulay thought it from 300 to 400 feet long (Tr., p. 2191).

The wire end of this line was run through the starboard quarter chock of the Ship and made fast by dropping it over the top of the starboard after bitts (Macaulay, Tr., p. 2191; Henry, Tr., p. 119). The Intrepid then "started in towing astern full speed" (Macaulay, Tr., p. 2191), between starboard and directly astern (Kennedy, Tr., p. 750; Miller, Tr., p. 1613).

In view of the claim of certain witnesses that the tug didn't pull with any particular force or effect, we make the following references to contrary testimony:

"The Intrepid was there pulling on her" (Lonche, Tr., p. 443).

"She was pulling, all right" (Kennedy, Tr., p. 750).

"All she could, and it was taut" (Miller, Tr., p. 1613); and see Tr., p. 1649.

"She pulled very vigorously; she seemed to me to pull for all she was worth when the line was made fast; right from the start she pulled hard" (Macaulay, Tr., p. 2200).

"Well, the Intrepid, while she was alone, she pulled *extra hard*, as near as I could say, but after the arrival of the Mikahala, it seemed to me that she didn't pull so hard, kind of eased up" (Macaulay, Tr., p. 2223), a possible reason being that the tide was falling (Macaulay, Tr., p. 2437), or perhaps short of water (Tr., p. 2437). See also Macaulay, Tr., p. 2438. But see further on page 2440, where he corrected this by saying it *appeared* to be so, but he did not wish so to testify.

"It was pretty taut (Tuesday and up to noon of Wednesday). About (Haglund, Tr., p. 2904). There was more or less sag, and might have touched the water in a particular spot at all times (Haglund, Tr., p. 3036).

The first day "it sagged a little in the middle" and occasionally touched the water, with the swell (Macaulay, Tr., p. 2201).

All of her power was put on in the towing, and "every high tide we put on passovers"—a passover meaning "live steam with low pressure engine," which increases the power of the engine (Barrett, her engineer, Tr., pp. 103-4). At low tide "just common full speed ahead" (Barrett, Tr., p. 104); and it didn't slack (Tr., p. 110).

After making fast "I gave her all she had" (McAllister, Tr., p. 84), and kept "full speed right straight through" (Tr., p. 88). The hawser would slack some in the swell, and hang in a bight, and pick up again (Tr., p. 93).

While Captain Henry claimed "there was not very much; not a great deal," of strain on the Intrepid's line (Henry, Tr., p. 125), although "there was times when there was more strain on it than others" (Tr., p. 125), and that when the line was out on Wednesday there was "very little" strain on it (Tr., p. 125), he had to admit that he had to ask the Tug to *slack up* because he wanted to throw off the line (Tr., pp. 123, 184).

Although Brisco said there was only "a little" strain on the Intrepid line, he had to admit, when pressed, that he did not take "much" notice of it, and finally to confess that he had not noticed the line at all (Brisco, Tr., p. 322), and had to say still further that *he did not know* (Tr., p. 323).

The Intrepid line was only dropped over the bitts (2 iron posts with flanged tops), yet he couldn't take it off unless the tug slacked up (Henry, Tr., p. 183; Lowry, Tr., p. 266). We would like here to refer to Capt. Henry's testimony (Tr., pp. 124-5), where he said that when the Intrepid line was cut "we had to shove it out through the wharfing chock to get clear of it," as it "did not pull itself clear of the vessel of its own accord;" and it was shoved off because it "would not go out." No one could read these statements, made as they are in connection with the strain of the Intrepid on her line, without taking them to mean, unqualifiedly, that the line was so slack it stayed loose on board after being cut. This is a sample of the unfair and unfrank and misleading trend of the testimony of this witness as a whole. Had he been *fair* he would

have testified to the *whole* truth, as Lowry did on this same point, that the line ran out and *stuck* and *jammed* in the chock (Lowry, Tr., p. 267). How could Lowry have said he was "expecting to see it jump over the side" if there was no strain on it? (Tr., p. 267.)

Moreover, although the witness Lowry said the Intrepid line "had a bight in it always" (Tr., p. 268), he was frank enough to add that "it was not in the water all the time, but it was *touching* the water. When the tug fell the rope would go in the water, *as the tug is low in the water herself*" (Tr., p. 268).

The effect of the Intrepid's work, especially on Monday before other assistance arrived,—and we urge that *here* the tug earned her salvage award in any case,—appears from the following uncontradicted evidence:

In the maneuver to get the ship from position 2 to position 3 (see Macaulay, Tr., p. 2192-94), the Huki and Intrepid, by pulling when the starboard anchor was taken up, insured getting into position 3 "which was *a big aid* to the vessel," brought about by them (Tr., pp. 2194-5).

"The whole ship was swinging gradually to the nor'ward before the Intrepid and the Huki arrived. There was quite a nasty swell. The swell kept heaving in, heaving her in all the time, and with her starboard anchor put down, it, of course, checked her some; *but when the Intrepid took hold* and the Huki took ahold, *they checked that swing. They held her stern for the time being until* we got real good assistance, and while they held her" the starboard anchor was

taken up to better the ship's position (Tr., p. 2198). It made the ship's position "much easier" (Tr., p. 2201). And see Tr., p. 3352.

And Captain Macaulay, in answer to the question: "With the bow held by the anchor in position 2, the swell striking the ship on the starboard side, what prevented her stern from swinging in on the reef?" the witness answered, "The Tug Intrepid." (Tr., p. 2199.)

Bear in mind that in position 2 the ship was much more to broadside than afterwards, and an hour more without assistance (and the Mauna Kea, the next boat out, didn't arrive until after 9 or 10 o'clock [Tr., pp. 749, 1761],—two or three hours later), *might* have seen her fully broadside.

With the southerly weather then prevailing,—*why she didn't* go broadside before aid arrived on Monday, was beyond the power of Capt. Macaulay to say. His answer was, "The Almighty had control of the elements" (Tr., p. 2384).

Macaulay considered that the assistance of the Intrepid was sufficient to justify him in taking that anchor up (Tr., p. 2218). That he would not have done so, otherwise, (Tr., p. 2199), shows how imminent the danger was.

McAllister says the services of the tug were certainly of value in preventing her going further on the reef (Tr., p. 88).

Barrett says that but for the tug she would have gone around (Tr., p. 106), and that the tug held her stern to the sea (Tr., p. 113).

In Haglund's opinion it is an easier matter to keep a ship from canting than to pull her off (Tr., p. 3108).

We argue, also, that if a tug, whose business it is to tow ships, could move a whole ship, free, even in the face of tide and swell or a rough sea, she ought to have power enough to hold one end of a stranded ship from *turning*.

In all, the Intrepid pulled from about 7 a. m. on Monday until about 12:20 on Wednesday, 53 to 55 hours (Barrett, Tr., p. 103; McAllister, Tr., p. 87-8), when her line was cut.

So far as danger to the Intrepid is concerned, she ran little, perhaps. She did endanger her engine, by using "passovers" (Barrett, Tr., p. 104), and she ventured into pretty shallow water, drawing 12 feet, and the bottom being likely to have rocks and boulders sticking up. Barrett says she *did* bump her rudder (Tr., p. 103); McAllister said not (Tr., p. 92).

The dependency of salvage upon "success" does not mean that actual aid rendered, which contributed substantially to the salving of a vessel, must go unrewarded if the agency which rendered it does not take part throughout. The service actually rendered was at a very critical time. It cannot be said *how* vital it may have been. It cannot be said that the Ship *would* have gone broadside but for the tug Intrepid, but still less can it be said that she would *not* have turned.

As to the tug's captain declining to let go his line, it may first be noted that the Intrepid did not refuse to ~~make~~ room for the Arcona. Nor does it follow that

the Arcona could not otherwise have assisted had her Commander been so disposed.

Finally, no prejudice whatever resulted to the Ship, as we will presently show.

We do not argue and have not argued from any standpoint of preference as between salvors, nor would we discuss salvage from the standpoint of benefit to the salvors.

The only question fairly involved in the issue as to whether or not the Intrepid was justified or unjustified in declining to cast off its line under the circumstances, is whether or not there was or was not sufficient room for the Arcona to have carried on salvage operations without displacing other salvors.

The argument has heretofore been used by appellant that the Intrepid acted in disregard of the interests of the stranded vessel and looked rather to its own interest; this being upon the assumption that the tug was attempting to deprive the stranded vessel of a presumably more efficient agency in order to claim more service and more salvage for itself. We shall presently indicate that the attitude of the Commander of the Arcona was such that the conclusion may fairly be warranted that any aid which was to be rendered by the cruiser was to be secondary—the primary object in the mind of her Commander evidently having been to do what he did with kid gloves and look first to the safety of his own vessel.

The cutting of the Intrepid's line was, we submit, under all of the circumstances, unfair to the Intrepid,

because it does not appear that her being there would have interfered with the salvage of the vessel. Except for the gasoline launch Huki, which was "no comparison" with the Intrepid, and a "negligible quantity on a ship of that size" (Tr., p. 1614, (and see Tr., pp. 2367, 2370, and Henry, Tr., pp. 167-8), the Intrepid was first out to the rescue, and her Captain naturally wanted to hold his place (McAllister, Tr., pp. 94-5), because he presumed that there was room enough for any seamanlike maneuvers upon his moving to one side, which he did. Moreover, the position taken by the Commander of the Arcona was arbitrary, unusual, unreasonable, and uncalled for, because he made it an absolute condition of his coming out at all to give "assistance," that he must be given the *best* position, and as this was held by the Intrepid (Tr., p. 2504), he demanded that she be removed.

Capt. Henry said, in answer to a question why it was necessary to cut the Intrepid's line in order to get the services of the German cruiser, "Because I could not get any *other position* for the German cruiser" (Tr., pp. 121-2). This is wholly inconsistent with the real fact that he couldn't because the Arcona *would not accept* any other. Referring to the Arcona's Commander, Capt. Henry testified, "He was willing to give assistance *on the condition* that I would get the Intrepid *out of that*" (Henry, Tr., p. 123). And see Henry, Tr., pp. 168-9.

Mr. Watkins said the Commander told Captain Henry in his presence, "that he wanted that position

and unless that was made clear for him that he would not take hold" (Tr., p. 3292).

And *why*, we ask, did the Arcona *have to have* that particular position? Apparently just because her Commander *wanted* it, and made it a condition precedent to his agreeing to come out at all,—a sample of the imperiousness that characterized his whole attitude.

It is argued that the Arcona was a "much more powerful vessel" and therefore entitled to preference.

Opposite counsel on the trial seems to have absorbed some of the ideas of the German Commander in this respect when he advanced to witness Piltz the idea that he certainly should have moved the Mikahala further over in view of the possibility that that powerful vessel might have moved over in *that* direction (Tr., pp. 1835-6).

There really was room, and the Intrepid made room,—sufficient for any *seamanlike* maneuvering to get a line on. How was McAllister to know that the "big powerful" vessel wanted to run two little lines instead of one "big powerful" line? Or that the two lines to be run had to be exactly astern to balance each other? There was an abundance of room to have run a towing line without any interference with any of the salvors. The tug Intrepid made room for the operation of laying the Miller anchor, by moving close over to the Mikahala, as Capt. Henry had to admit (Tr., pp. 168-9), and he had to admit further *there was then room for the Mokolii towing the Makee to come in between the Helene and the Intrepid, and for the Makee to be*

drawn right in to the Celtic Chief and out again (Tr., pp. 168-9), and to admit also that this operation was successfully carried on without danger to *any* of the vessels (Tr., p. 169), and that there was *plenty of room* "after the Intrepid moved over" (Tr., p. 170). Piltz testified to the Intrepid coming close to the Mikahala, and said there was nothing of danger from it (Tr., p. 1826).

And when the Arcona was coming out (the letter to McAllister having been previously delivered to him) the Intrepid again moved over close to the Mikahala and was *close to her* when her line was cut (Henry, Tr., p. 183).

That there was ample room to run in a line or even two lines is shown by the following testimony.

The Arcona and Intrepid would not themselves have been near enough to have been in any danger of touching, because the Intrepid was about 408 feet from the Celtic Chief (Haglund, Tr., p. 2902) * * * because Haglund *knew* the Mikahala to have been about 513 feet from the Ship and thought the Intrepid 20 or 30 feet less, and the Arcona, when in position, was 200 meters (650 feet), by the testimony of her own officers (Schroeder, Tr., p. 394, and Conneman, Tr., p. 429), and Haglund said "about 660" (Tr., p. 2902).

And between the Helene and Mikahala it was "all of 300 feet" (Piltz, Tr., p. 1285), and the Intrepid was ordinarily "about three-quarters of the way towards the Mikahala" (from the Helene), (Piltz, Tr., p. 1220), and the Intrepid ranged closer than that and once or

twice came alongside the Mikahala and touched (Piltz, Tr., p. 1826), and there was "nothing in her coming up alongside the Mikahala in that way" * * * "no more danger from that fact" (Tr., p. 1826).

With the Intrepid say 25 or even 50 feet from the Mikahala, there would still have been about 250 feet between the Helene and Intrepid for a line to have been run in while the Arcona held a position midway. With 100 feet clear on either side of her (allowing 50 feet for her own width out of the 250), between the Helene and Intrepid, the Arcona would have been as safe as the Mikahala and Intrepid within 50 feet or less of each other, or the Helene and Likelike, which were about 100 feet apart (Haglund, Tr., p. 2907).

Consider the "warning" given McAllister that his line would be cut. The letter (Tr., p. 2490), although requesting the tug to *let go*, shows that the *purpose* was to make room for the cruiser, and that the Intrepid might continue to pull, but from another position. Capt. McAllister made all necessary room by moving over. He says he had no other warning except a message given him by Mr. Singlehurst who asked him *to let go* (McAllister, Tr., p. 94), and he refused because he didn't know who Singlehurst was, although he learned afterwards (Tr., p. 7). At that time *nothing was said about his having another position,—only to let go*, or his line would be cut. So McAllister replied, "That's up to you, whoever you may be." (Tr., p. 85.) And see Weisbarth (Tr., p. 604).

The witness Lowry, who did the hailing of the *Intrepid*, says he did it *only once* (Lowry, Tr., p. 267).

The defense will argue that the Captain of the *Intrepid* had no right to try to stay there to prevent the ship receiving the aid of the cruiser. We reply that if the case had been that Capt. McAllister were informed that it was an absolute condition that the cruiser *would not* attempt to assist unless the *Intrepid* were *moved away* from that position, *then* it would have been wrong for him deliberately to have stood in the way of the ship receiving that aid.

But Capt. McAllister was *not so informed*, and, we submit, he would not reasonably suppose the cruiser would have made such an extraordinary condition to rendering assistance. Capt. Henry "*did not say or state to Captain McAllister* that those were the conditions on which the *Arcona* would pull." He says, "No, *certainly not*; I had no reason to do so." (See Henry, Tr., p. 169.) That wasn't fair to McAllister.

Suppose the German Commander, in the same spirit, had called for the entire maneuvering room (it seemed that he needed it if his maneuvering shown indicates anything), and wanted the other vessels also to "get out of that." Would it have been the duty of all the vessels to have obediently let go and withdrawn, to give him a free hand and the surrounding ocean to demonstrate the mightiness of the German Navy? We submit not. There is a reasonable range within which any ordinary mariner, aiding in salvage, may determine whether the demand of the new comer is reasonable or

unreasonable, and how far egotism and arrogance should be permitted to interfere with common salt water sense. We respectfully submit that the Captain of the Intrepid had a right to look for common maneuvering skill at least from the Arcona, and that there *was* plenty of room for that.

Even Capt. Miller, regarded by appellant as guilty of reprehensible conduct, and although fighting the Intrepid in this case, considered that the cutting of the line was a "downright dirty piece of work" (Tr., p. 1676).

In any case, the refusal of Capt. McAllister to let go did not in any way operate to the prejudice of the Ship, nor delay the Arcona in any respect, *because the cutting was done* while the Arcona was coming out of the harbor and *before she arrived* (Macaulay, Tr., pp. 2490-1).

Her line having been cut, however, the Intrepid did not abandon the ship, but told the master of the Ship "that she was there waiting and ready to render any other assistance" (Macaulay, Tr., pp. 2491-2); and Capt. Macaulay says further that "she was there ready to render assistance," but was not asked to render more (Tr., p. 2492). McAllister says, "I went aboard of the Ship and saw the Master, and asked him if he required my assistance any more. He told me no. I said, 'well, I will lay here anyway within hailing distance of you. In case you need me I am in hailing distance.'" (McAllister, Tr., p. 86), "and he said, 'all right'" (McAllister, Tr., pp. 95-6). And the tug

“stayed there until the vessel went into port” (McAlister, Tr., p. 95-6). And see Barrett (Tr., p. 105).

But Capt. Henry did not make good the terms of his letter by offering to take a line from the Intrepid from some other part of the ship, although Capt. Macaulay, knowing all of the circumstances, thought that, according to the terms of his letter, Capt. Henry having cut the line *should* have had something “more to do” with the Intrepid (Tr., pp. 2491-2).

We refer the Court to the case of *The Amsterdam*, reported in 7 Aspinwall N. S. 400, as bearing on the consideration which should be given the Intrepid for having thus stood by.

OPERATIONS OF THE INTER-ISLAND STEAM NAVIGATION COMPANY., LTD.

Promptitude Initially:

At about eight o'clock on Monday morning Mr. Kennedy was informed that the Celtic Chief was ashore and he went down immediately in his automobile to the Inter-Island wharf, where Capt. Haglund told him that the Ship was just reported on the reef (Tr., p. 746). He immediately gave orders for the Mauna Kea and Mikahala to get up steam. It is clear that the Mauna Kea and Mikahala, not having to go up on schedule until Tuesday (Tr., pp. 2889, 2958), did not have steam up on Monday morning. At that time the Iwalani (also an Inter-Island steamer) was practically ready and was able to get under way in 10 or 15 minutes, and in that

time Mr. Kennedy went out in her to the Ship, and aboard her at about quarter of nine o'clock (Tr., pp. 749, 770-71), and expressed sympathy and offered assistance, to which the Ship's Captain replied that he "wanted all the help he could get" (Tr., p. 746). Help was requested.

Stopping only long enough to size up the situation Mr. Kennedy immediately went back in the Iwalani and ordered the Mauna Kea and Mikahala to go right out (Tr., pp. 746, 749). There was nothing said about terms or charges.

Having gotten steam up the Mauna Kea got away first (Tr., pp. 1770, 2201), arriving before eleven o'clock (Tr., p. 2205). The Mikahala followed, also arriving a little before eleven o'clock—or a little after (Tr., pp. 771, 1764). In the case of the Mikahala it was only "about fifteen minutes after we dropped the anchor until we started pulling full speed" (Tr., p. 1764).

INTER-ISLAND LIGHTERING.

The lightering done by the Inter-Island Company by use of its small boats, in the open sea from a vessel hard aground, and carrying the cargo across the field of the hawser operations to other vessels of the Inter-Island Company, was unusual and dangerous. It was not mere "lightering" any more than towing on a stranded ship would be mere "towage."

Captain Haglund, the Inter-Island Superintendent, first went out to the Ship a little before seven o'clock

on Tuesday morning, going out on the steamer *Helene*, which arrived there shortly before eight o'clock (Tr., pp. 3017-18). He went on board the *Mikahala* for a few minutes and went on board the *Celtic Chief* (Tr., p. 3018), and made the arrangements for lightering (Tr., pp. 752-4), which was requested by the Ship's master (Henry, Tr., p. 203).

Yet again, on the point of Inter-Island lightering: Counsel have heretofore urged that the Inter-Island Company was "actually negligent" in beginning to lighter the *Celtic Chief* "without having out anchors to prevent it from going ashore." Counsel appear in the case for one John Henry, *Claimant*, and *Master* of the *Celtic Chief*. In the first place the Inter-Island boats *did* put out their anchors first, and we will elsewhere indicate to the Court their holding power and the testimony that they did hold the ship substantially. But, consider this claim as coming from the *Claimant*, who engaged Miller's lighters immediately, and insisted on the work going on, and who was angry when Miller didn't return as per agreement to continue it, and who, on that occasion wanted the Inter-Island to hurry and get at it again (Tr., pp. 202-3, 248, 660-1, 752, 1351-2, 1355, 3054-5). Claimant would put the salvors to a penalty for continuing what he initiated.

In response to the request to lighter, Captain Piltz, then mate of the *Mikahala*, was sent on board the ship, arriving there at about eleven o'clock Tuesday morning, to attend to the lightering of the cargo (Tr., p. 1770). Lightering was begun on the main hatch (Tr.,

p. 1770), at about eleven o'clock (Tr., p. 2013), and continued up to noon, and during the dinner hour the after hatch was rigged, and with an increase of men at one o'clock, both these hatches were worked all that afternoon and all evening and until two o'clock in the morning (Tr., pp. 1771, 1774, 3089). In all lightering the work was done by men from the two steamer crews and extra stevedores employed by the Inter-Island Company, about 100 in all (Tr., p. 1774), and the boats used were the steamer boats of the Helene and Mikahala (Tr., p. 1770). When Mason testified (Tr., p. 956), that some of *Clarke's* men were discharging freight into the Inter-Island boats, he was mistaken. He didn't know (Tr., p. 968). On Tuesday and up until 2 o'clock Wednesday morning five boats were working, three of the Mikahala and two of the Helene (Tr., p. 1774). Later there were three also from the Helene (Tr., p. 2014). Lightering was resumed at both hatches, using the Ship's winch, about 6 o'clock Wednesday morning and continued until noon (Tr., pp. 1776-7, 2983).

To go back a moment from this point, the Ship's winch had been used as the power to draw the sling-loads of fertilizer from the hatches (Tr., p. 1771), the falls being taken to the gypsy heads on opposite sides of the winch and the power applied alternately (Tr., pp. 1771, 1775, 2983), because for some reason the winch could only lift one load at a time (Tr., pp. 1775, 2882), even though there were only three or four bags (Tr., pp. 755, 1775, 2818, 2982, 2283), to a sling. It

couldn't raise six bags at all (Tr., p. 2882). With a load of four bags the winch would hoist "very, very slowly" (Tr., pp. 2982, 1775). *Something* was wrong with it (Tr., pp. 822, 755-6, 1775, 2283, 2785). Salt water was used (Tr., pp. 2883, 2983, 1775, 2283). It could not lift more than half a ton at the most. (Hag., Tr., p. 3007). The fertilizer bags were different sizes, some heavier than others (Tr., pp. 756, 2886), and weighed about 200 lbs. and some perhaps 250 lbs. (Tr., pp. 756, 1776, 2885), or an average slingload would weigh 700 or 800 lbs. (Tr., p. 1776).

Mr. Kennedy saw, on Wednesday morning, that the Ship's winch was being used to haul in lines, and it couldn't in his judgment work fast enough anyway (Tr., p. 755), so with the assent of the Captain of the Ship (Tr., p. 755), he returned ashore and sent out a donkey barge and hoist (Tr., p. 756), hired by the Inter-Island Company from McCabe, Hamilton & Renny (Tr., p. 754), just previously arranged for, subject to call (Tr., pp. 754-5). This floating donkey hoist was brought out at about noon on Wednesday and was moored by an anchor of its own (Tr., p. 2008), and lay opposite the main hatch on the port side (Tr., pp. 1777, 2007), and was used thereafter to work the main hatch. The Ship's winch continued to be used for the after hatch alone (Tr., pp. 1777, 2885, 2983; Henry, Tr., p. 158). At about 11 p. m. Wednesday night work was stopped on the main hatch (Tr., p. 3156) to get the scow out of the way. There was "no comparison between the two"—the ship's winch and the donkey on

the barge (Tr., p. 2284). The barge hoist took 6 to 8 bags (Tr., p. 3204), and did it in half the time (Tr., p. 2984). The cargo from the after hatch was received by the boats on the port side of the ship, and on the starboard side from the main hatch (Tr., p. 2009).

The fertilizer taken out was put on board the Helene and Mikahala, first on the latter and then on both (Tr., p. 1778). The lightering from the after hatch continued right up to about 11:30 p. m. Wednesday (Tr., pp. 1778, 3090). Lowry even said "right up to the time we floated (Tr., pp. 278, 286, 290), and Henry the same (Tr., pp. 137, 138). In all the Inter-Island Company took out about 365 tons (Watkins, Tr., p. 1203). See Henry (Tr., p. 127), and Haglund (Tr., p. 3095). *The Danger Incurred in Lightering:*

On account of the swell and general conditions prevailing during the salvage operations considerable danger was involved to the Inter-Island small boats and the life and limbs of the men engaged. It is not contended that the danger was extreme, nor that the men deserve medals. We submit that the danger was considerable,—and considerably in excess of the risk attendant upon discharging freight among the Island ports. In any case it seems to us that it is no argument to say that because in the Inter-Island work there are occasionally times when considerable risk *is* run by the boatmen, and boats are occasionally lost or broken or overturned, and men drowned, killed or injured, there is no merit in the service rendered at the Celtic

Chief because there has *sometimes* perhaps been *as much* danger run elsewhere as at the Celtic Chief. We say that the very fact that these men were, by their practice, skilled and daring, and could undertake and execute such work, rendered their service more valuable to the ship. Without that skill enabling them to go closer to the danger line and do with a less degree of danger what no landsman or ordinary seaman could have dared to do, the work could not have been done.

It is urged by Counsel for the appellant that the danger was negligible; that swamping of the small boats was a mere possibility, as also was the danger of men being struck by the sling loads. Also it is said that the swells were no greater than encountered in the ordinary course of the Inter-Island business. It is claimed that Capt. Tullett has admitted this (citing Tr., p. 2693); and that Watkins says it was smooth in comparison with what we see every day in trips to the other Islands (citing Tr., p. 3294).

The citations just noted are examples of those often made by appellant's counsel, and will not bear out the points sought to be made when further statements of the same witness are considered. The citation of Tullett's answer on page 2693 is intended to show that there was no danger here more than in the ordinary course of business because in ordinary business swells often run as high as then. But the witness was then referring simply to the bare point of height of a swell. He immediately proceeded to show that *at sea* both the vessel and small boats rise and fall more or less to-

gether (Tr., pp. 2695-6). Again, the reference to Watkins' comparison of the operations there with those of the Inter-Island boats at other ports, must be considered with his further replies on cross-examination on the point, where, when asked to give an instance, he picked out one where in his *own* judgment, it was "rather dangerous" (Tr., p. 3303), and explained why (Tr., pp. 3303-4),—all in a case where the vessel was afloat in deep water.

Let us look at the testimony. Mr. Watkins, the active representative of the ship and cargo here (Tr., pp. 1212, 3285-6), thought the work at the Celtic Chief in the small boats was less difficult than in the Island work, and compared the two (Tr., p. 3294). This comparison being referred to on cross-examination he was asked if, *in making it*, he had had any particular ports in mind. His answer showed he had in mind a trip taken thirteen or fourteen years previously, when he observed the discharge of freight, when it was rough, and thought that "the operation was rather dangerous because it was exceedingly rough" (Tr., pp. 3303-4). In *his* opinion, "when a surf boat is alongside of a vessel and there is a very heavy swell, why, the crew in the boat have got to look out that the boat is, at least they have got to keep their boat from being banged against the side of the vessel; they've also got to look out for the sling, that the sling doesn't strike them coming down, and *those are conditions that I call difficult*. In rough weather all hands have got to be on the alert that they don't get hurt themselves or that

they don't hurt the cargo or that they don't hurt the boat" (Tr., pp. 3303-4). He admitted at the same time that the Concord and Kaimiloa were surging (Tr., p. 3304), and "were doing considerable rising" and had "a violent strain" on their ropes (Tr., p. 3305). Also that *there was* "quite a heavy swell" (Tr., p. 3293).

We submit that if the Concord and Kaimiloa were doing considerable rising, surging and straining,—*and they were*,—(see Watkins, Tr., pp. 3304-5; Lowry, Tr., pp. 276-7; Weisbarth, Tr., pp. 571-3, 642; Miller, Tr., pp. 1424, 1428-30; Henry, Tr., p. 203; Brisco, Tr., pp. 348-9),—then, with boats of their vastly larger dimensions and displacement in comparison with the small shore boats used for this lightering, the swell *must* have been "considerable" for the small boats.

Referring back to the evidence heretofore reviewed relating to the kind of swells and their effect (see pages 10-18 of this brief), we now couple with it the evidence of the resulting danger to the Inter-Island boats and men.

In the opinion of men skilled in discharging of freight, and familiar with the conditions and possibilities attendant upon the *regular* work, the lightering done by the shore boats in the case of the Celtic Chief, was both difficult and dangerous; and more so than is the case in the Inter-Island work.

In her final position on the reef, which was practically the same during all of the Inter-Island lightering operations, the depth of the water appears from the following testimony:

Depth of Water:

Lonche: 16 or 18 feet (Tr., p. 568).

Haglund: 19 feet aft (Tr., p. 2907).

Piltz: Too shallow for boats to go safely around her bow (Tr., p. 2010).

Macaulay: $4\frac{1}{2}$ fathoms when partly on (Tr., p. 2185) between 8 and 9 o'clock Sunday night (Tr., p. 2186). 19 feet at starboard quarter; 16 feet at bow (Tr., pp. 2193, 2196).

Henry: $3\frac{1}{4}$ fathoms all around (Tr., pp. 226, 250, 251). (Note: This is probably with reference to 8 p. m. Sunday as stated by Macaulay (Tr., pp. 2185-6), or 11:30 a. m. on Wednesday after lightering come. See Brisco (Tr., p. 330).

Lowry: (Same as Capt. Henry) (Tr., p. 281).

Brisco: $3\frac{1}{4}$ fathoms at 11:30 a. m. Wednesday (Tr., p. 330).

Schroeder: "Aft, amidships, and in the forepart, were 19, 18 and 16 feet of water respectively" (Tr., p. 384).

And we have a judgment of the risk from one of the Ship's own witnesses, Lowry, who was asked (Tr., p. 278) :

"Q. Was there any danger to the Inter-Island boats used in lightering?

"A. Yes, it was pretty risky work.

"Q. How?

"A. The swell running alongside the ship and these small boats.

"Q. What danger was that?

"A. Well, there was the danger to the men in the boats; a sling of bags hanging over the side and the boat jumping about, and they had to land that sling into the boat and *it was pretty risky.*"

Capt. Piltz, for 18 years a mariner in all Pacific waters, from sailor to master (Tr., p. 1758), and with 10

years' experience in the Inter-Island trade (Tr., p. 1759), said this work "was done *under very difficult and dangerous conditions*" (Tr., p. 1797), on account of the swell.

Capt. Macaulay, with 42 years of sea experience all over the world, and for 29 years in Hawaiian waters (Tr., p. 2166), when asked if he thought there was any danger to the *boats* in these lightering operations, answered, "I certainly do" (Tr., p. 2284). Asked further if there was any danger to the *men* operating these boats, replied, "There certainly was" (Tr., p. 2285).

Of the same opinion was Capt. Haglund (Tr., p. 2981), he being also of large sea experience (Tr., pp. 2886-8).

It is well enough for a landsman, or even for Captain Henry and other seamen who know nothing of like work or conditions in these Islands, to compare the mere *size* of the swell seen out at the ship with swells seen over deep water, or where a boat is working from a *floating* vessel. We submit that their opinions are entitled to little weight as compared with those who are experienced, who took part in the Celtic Chief work, and who are better qualified to judge.

The Celtic Chief being stationary, fast to the bottom, the Ship did not have any "give" or elasticity in the water as has a vessel afloat. She could not rise or fall, nor tend forward and back *to any degree* with the small boats, and in consequence, the comparative rise and fall of the small boats and their surging back and forth, and other motions, resulted in a greater extreme

of motion for them in the case of this *fast* ship than prevails where the larger vessel is *floating* in *deep* water and takes *some* of the rise and fall and gives *some* under the onward pressure and receding motion of a large swell. In the words of Captain Piltz, a working boat lying alongside of a vessel afloat, *both* "have the range and the sway of the swell" (Tr., p. 1797). A floating vessel gives with the sea; when the boat is working at a stationary object (a wharf or landing for example, see Tr., pp. 2679-80) "the boat has to take the full swell and all of its force" (Tullett, Tr., p. 2680). Tullett says: "there is a great difference" (Tr., p. 2680). See also on this same point the further testimony of Tullett (Tr., pp. 2674-5, 2695-7), Piltz (Tr., p. 1961), and Nelson (Tr., p. 2786).

Another considerable difference, increasing the danger at the Celtic Chief, was the shallowness of the water. A swell may be considerably higher, in deep water, and be less dangerous, than a smaller one over shallow water. Over deep water there is very little incline to the forepart of a swell. But when a swell strikes shallow water, as the edge of a reef, it rises, and as the lower part of the motion is retarded by friction on the bottom, the top travels faster and so increases the forward incline until it becomes perpendicular, and then it "breaks" (Tr., pp. 2286, 2611-12, 2680). See also the opinion of the Court in the Chiusa Maru case, 3 U. S. Dist. Ct. Rep. 361, respecting swells on this same reef. It follows that if the swells were breaking at and just forward of the bow of the Celtic Chief during these

operations, the *incline* of the oncoming swell amidships at the Ship was considerably sharper than in any case of work over deep water. See also on this point, Piltz (Tr., pp. 1959-61).

In the words of Capt. Macaulay: "The stranded Ship was inside the line of breakers and the month was the month of December, liable for a heavy sea to run in there at any time" (Tr., p. 2284); and "*there is no warning given* to you when you are inside the breakers on the reef on the lee side of the Island of Oahu. There is no warning. The sea may be perfectly smooth. All at once, and all of a sudden a roller comes in there and curls over and breaks and if you're close to that breaker you're going to get capsized" (Tr., p. 2286). It is true that while the Ship lay there the breakers did not often break further out than her bow, but one big swell *did* break abreast of her forehatch (Tr., pp. 2679, 2727). Her position was within the edge of the first or outer reef, and on the edge of which the breakers do break in Southerly weather. The fact that the photographs referred to by the Court (Tr., p. 3350), show the swells breaking further in than the bow of the Ship, ought to be sufficient answer to the intimation heretofore made that these photographs were taken at the "most favorable" moments. (And see Tr., pp. 2727-28.) In a comparison with the Hamakua coast, which is unquestionably about the worst in the Islands for steamer boat work, Captain Macaulay says that all along there is very deep water, "and there are no sudden breakers," and "when the weather changes on the Hamakua

coast it gives you warning." We have already shown that during the Celtic Chief operations the weather was unsettled and southerly and liable to a change.

The men were accustomed to discharging freight "not exactly of that kind as existed at the Celtic Chief, but in the seaway alongside of steamers" (Haglund, Tr., p. 3077). Even in the regular Inter-Island work there are times when the work wouldn't be undertaken (Tr., pp. 2696-7).

The particular danger to the *boats* was their being broken by being banged against the vessel (Tr., p. 2674), or having a slingload go through the bottom (Tr., p. 2674), or capsized by the load getting on or under the gunwale (Tr., p. 2776), or swamped or capsized by the swell (Tr., p. 2286).

The particular danger to the men working in the boats was that a sling load would be hanging over their heads and with the boat surging back and forth they were in danger of being hit or injured by the load either hanging or dropping on them or the boat rising hard under it catching them between the boat and the load. Several of the men *did* actually get knocked over into the bottom of the boat. (Piltz, Tr., p. 1798; Tullett, Tr., p. 2674; Nelson, Tr., p. 2786).

In case of a boat capsizing the men were also in danger of being drowned (Tr., pp. 2285-6).

There is always danger in standing below a load of cargo (Macaulay, Tr., p. 2286), and in this case the danger, both to the men and boats, was increased on account of the inability of the Ship's winch, from lack

of power, to be used to pull up the burden fall in case it were necessary to lift the load to avoid a swell coming. With the winch used (as it was up to Wednesday noon), for both the main and after hatch, if the winch were at its alternate work of drawing a load from one hatch, it was not powerful enough for its *other* gypsy to be used at the same time to hold the burden fall and *hoist* on *that* if necessary (Haglund, Tr., pp. 2982, 2983). Consequently the burden fall (which is the rope used to slack down the load after its weight is thrown on the yard-arm for lowering), had to be *held* by taking a turn around a belaying pin at the rail, and the rope *paid out* to lower. This meant *slacking from* the pin, only to *lower*. It could not be raised. (Haglund, Tr., p. 2982; Fern, Tr., p. 2884; Nelson, Tr., p. 2786; Piltz, Tr., p. 2740.)

It had, therefore, to be let down slowly, "and that's where the danger came in" (Tr., p. 3079). On the other hand it couldn't be let down "in a second" because it might "break the boat and kill somebody" (Tr., pp. 3078-9).

In practical experience, in the Inter-Island work the burden fall is given a turn or two around the winch and so "can be lowered and lifted up very rapidly, and altogether much safer than it would be in this case out at the Celtic Chief" (Haglund, Tr., p. 2983).

Even after the donkey was brought out on the scow and used for the main hatch they couldn't even then use the yard-arm burden fall on the gypsy of the winch to raise a sling load if necessary because "the winch

was not powerful enough, not quick enough" (Haglund, Tr., pp. 2982, 2983-5).

Captain Piltz having testified that he saw men knocked down by the sling loads in these operations, counsel endeavored to have it admitted that "occasionally" in the Inter-Island work men in the boats are hit by sling loads and at the same time wanted only an affirmative answer that such a thing "has happened," and sought to prevent anything more being said by the witness (Tr., pp. 1868-70). However, on redirect examination his answer was completed, and with respect to relative frequency the witness said that in the regular work a man may be hit "probably in two weeks or once in three weeks, whereas out here one or two got struck in this operation the first two days." (Tr., p. 2741). And on page 1871 he said he hadn't seen it happen for about a year or so himself. He said further that although there is always danger of being hurt in the inter-island traffic, there is not as much as there was at the Celtic Chief (Tr., p. 1962).

These very dangers, specially existing here, prompted Haglund to give careful and particular warning to the men (Tr., pp. 3093-4),—a thing not ordinarily necessary. Bear in mind, also, that these men were themselves skilled in ordinary unloading work in the open sea; work which is itself often dangerous; almost certainly so with inexperienced hands.

Furthermore, the work was carried on at night as well, and it needs no argument to impress one with the fact that lantern light serves often only to accentuate

the darkness, and darkness certainly accentuated the danger in this case (Tr., pp. 2675, 1798, 2984). Distances or speed of slings cannot well be judged when one alternately faces a blinking light and darkness.

In matching his imaginative ingenuity against the practical experience and knowledge of Captain Piltz, counsel did not score in his effort to get some admission from Captain Piltz that the lightering operations were conducted in any impracticable way (See Tr., pp. 2007, 2020, 2025-28). The contrary fact was established that the work was done in the *most* practicable way—danger, all conditions, and need of speed all considered. (And see also Haglund, Tr., pp. 3075-80.) For the sake of rapidity of discharging, certain parts of the work were done under more dangerous conditions than would otherwise have been accepted. (See Haglund, Tr., pp. 3075-77-80, 3088; Tullett, 2725-7; Macaulay, 2608-9.)

The work was being pushed as rapidly as possible in order that the Ship would be lightened as much as possible before the midnight tide that night, when it was confidently expected that the Ship would come off.

The taking out of the 365 long tons by the Inter-Island Company allowed the Ship to float $12\frac{1}{2}$ inches higher (being at the rate of 4 inches for each 100 tons taken out (Lowry, Tr., p. 290). Captains Henry and Macaulay figured by the builder's scale that 40 tons out would raise the Ship two inches (Tr., p. 2296). Captain Miller took out 246 tons, which would allow a rise of about $8\frac{1}{2}$ inches.

Looking now to the fact that the Ship's floating draft was 20 feet 10 inches forward and 21 feet aft (Henry, Tr., p. 251), and that her depth in the water while aground was 19 feet aft and 16 feet forward (See page 59 of this brief), a rise of $12\frac{1}{2}$ inches plus $8\frac{1}{2}$ inches, or 21 inches, would practically float her stern, and the *pulling* to float her would only have to be enough to move a body of water equal in volume and weight to that still displaced by the forepart of the Ship to the depth yet required to float her. Captain Henry said the lightering lightened the ship "very considerably" (Henry, Tr., p. 252), giving her a rise of from 18 to 24 inches (Tr., p. 253).

It follows, then, that the combined lightering operations were of very great benefit to the Ship. The pulling off was of course just as necessary, but a much easier matter. Captain Macaulay and Captain Henry had it figured that at 6 P. M. Wednesday, if forty tons more cargo were thereafter taken out it would raise the Ship two inches (Tr., p. 2296) and this would give her a floating draft of 19 feet, approximately, at high water (Tr., p. 2296). Macaulay also said, "She seemed to get livelier as the tide rose." (Tr., p. 2298).

The vessel came off at 12:22 that night—before high water, which was at 1:12, according to the tide tables.

OPERATIONS OF INTER-ISLAND STEAMERS.

The Mauna Kea.

The Mauna Kea dropped her anchor off the port quarter and sent her line aboard the ship, the line being a brand new 12-inch manila hawser right out of the coil (Tr., pp. 2206, 1770). Parcelling (wrapping) was put on the mizzen mast and then the end of the Mauna Kea line was given two or three turns around the mizzen mast and then two half-hitches, leaving a long end (8 or 10 feet), which was lashed to the line itself, and the line was then parcelled in the past quarter chock. Thus made fast, "she started in to pull (Macaulay, Tr., pp. 2206, 2463). She also put out her anchor and got a strain on it (Tr., pp. 1927-8, 1938). Further using the testimony of Captain Macaulay, "she straightened out that hawser and pulled pretty hard. In fact, she pulled so hard that it closed up the two hatches, right close up to the mizzen mast and was rendering the original round turn(s), rendering them around and drawing them around until the long end that was lashed hauled up close to the mizzen mast and became a great bunch.

* * * The result was that the hawser broke in the quarter chock" (Tr., pp. 1551-2, 2206-7). This break was several hours after the Mauna Kea came (Tr. pp. 1552, 2207). And Kennedy (Tr., p. 779). To the question, "How did she do that?" this witness answered, "By actual pulling" * * * "The strain,

the actual strain, broke the line." (Tr., pp. 1552, 2207).

We here wish to emphasize the fact that this *first breaking* of the Mauna Kea line was *not* by a *jerk*, as it was the *second* time. Throughout the trial in court and in the testimony in depositions repeated statements are made that the Mauna Kea "broke her line" by jerking or steaming ahead suddenly on it. That is true of the *second* break, but not the first. Of the *first* break, Macaulay, on cross-examination again said "the Mauna Kea steamed ahead and strained at that hawser and *pulled a steady strain* and parted that line" (Tr., p. 2463). We quote here from him further that in this instance the line did *not* break immediately upon its being straightened out (Tr., p. 2463). He was emphatic that "she parted that line by a steady *pull*" of perhaps an hour (Tr., p. 2464). Counsel may be accepted as having shown by Captain Macaulay that possibly the Mauna Kea was carried nearer to the ship—a trifle at least—by the swell, and that it may have been due to the effects of that swell by causing the Mauna Kea to surge ahead, that the hawser broke" (Tr., p. 2471).

The *opinion* of the witness is, however, that "There was a perfect strain on that line." In any case the tendency of the swell to cause a pulling steamer to surge ahead is not questioned. It is part of our case. We contend that this tendency was in actual operation on all the steamers and that thus the theoretical and mathematical calculation of "effective thrust" of pro-

pellers becomes only a part—and a comparatively small part—of the actual pulling power of a steamer moving in a swell—and the heavier she is the more power. This we take up more particularly later.

On this line first breaking, Captain Macaulay goes on to say that a messenger was run and the line gotten on board the second time and a greater amount of parcelling and tying done, whereupon “she went ahead, it seemed to me, full speed * * * and she burst her line the second time and almost took the mizzen mast out of the Ship. She dented that steel mast. A person would not believe it unless they actually saw the dent in that steel mast; it formed a ring, and it left that mast in a condition that any surveyor would never allow that Ship to go to sea with that mizzen mast” (Tr., p. 2207; see also, Louche, pp. 500, 514; Lowry, p. 284). “I believe that the Mauna Kea broke the line the *second* time by a very quick and rapid pull, not a steady pull, but what wreckers call in salvage cases, a jump, jump her off” (Tr., p. 2208). This method, as an attempt along that line, was approved by the witness (Tr., p. 2209). Mr. Kennedy also approved it, the *steady* pulling not having moved her (Tr., p. 780). The dent made by the Mauna Kea in the steel mast was $1\frac{3}{4}$ inches deep (Lowry, Tr., p. 284).

The Mauna Kea, having broken her line the second time, again made fast and pulled until about 7 o'clock on Tuesday morning, when she passed her line to the Helene, which came out then and left the scene in

order to make her regular run with passengers and mail.

Appellants' counsel have intimated that on this appeal they were not disposed to challenge the findings of the trial court as to the pulling done by the Inter-Island vessels and by the Intrepid. We therefore gladly avail ourselves of the opportunity to shorten our brief, by largely omitting the quotations of evidence on these points; but, to preserve our general plan of making our brief serve the Court more or less as an index to the mass of evidence, we will nevertheless cite the pages where the testimony is to be found if reference is desired.

As to the position and condition of the Mauna Kea's line, etc., see Transcript pages as follows:

References to Mauna Kea Line:

- Piltz: pp. 1770, 1772, 1874, 1876, 1877, 1878;
- Macaulay: pp. 2206, 2464, 2466, 2468, 2470, 2471;
- Henry: p. 126;
- Lowry: p. 269.

See also the photograph in evidence as Exhibits I to N (Tr., pp. 2685-8), showing the Mauna Kea and Intrepid and a portion of the line of the Mauna Kea, and see also page 2905 of the transcript where Captain Haglund, looking at Exhibit J, said that about 400 feet of the Mauna Kea line is there shown. Note also, that the line is "practically straight" and is not touching the water, although made fast very low to the water at the Mauna Kea. Note also, that if 400

feet of the line is here shown (much more than half—and the lowest end at that) the *rest* of the line is also clear of the water.

Counsel for appellant have heretofore urged that the *Mauna Kea* having left the salvage operations before success was attained, its services theretofore rendered did not contribute to the safety of the Ship, and that the Ship's situation was no less dangerous situation than when the *Mauna Kea* arrived. This, we submit, is controverted by the evidence. The claim before the Court is not that of the particular vessels, but of the Inter-Island Company. If the *Mauna Kea* did good service while there, the substitution by the salvor of one vessel, or one tool or employee for another, in the course of its one continuing operation, justifies no conclusion that the *Mauna Kea* did nothing of merit worthy of reward, any more than a changing of captains, set of stevedores, or the like.

It is respectfully submitted, on behalf of the *Mauna Kea*, that even though she was obliged to leave the ship on Tuesday morning, her work formed a part of the continuous pulling on the same line; and also, in view of the fact that the Ship was in great danger of going broadside on Monday—evidenced, we think, by her moving further in in spite of the *Mauna Kea*'s pulling, her motion might otherwise have been toward broadside.

Moreover, the record shows that the *Mauna Kea* stood the brunt of the added driving force of the swell against Miller's hulks, and, without that help, it can-

not be said that the Mauna Kea did not really stand between the Ship and her destruction at that time.

The Mauna Kea did not leave until she passed her line, *while pulling*, to the Helene, as we will presently show.

The Mikahala:

The first move of this vessel, on going out, was to steam out and drop her port anchor (Tr., p. 1764) about two points east of the stern of the Ship (Haglund, Tr., p. 2892) and back toward the Vessel, paying out anchor chain; then she sent her line aboard, a brand new 8-inch manila (Tr., pp. 1764, 2221), and by use of her winches then pulled up on her anchor chain until taut (Tr., p. 1765), by which time there remained out about 30 fathoms of chain in 5 fathoms of water (Tr., pp. 1765, 1863). Once connected and pulling, the Mikahala line was about 500 feet long. (Haglund, Tr., pp. 2902, 2222; Tullett, p. 2709).

The end of this line on the ship passed through the starboard quarter chock and made fast to bitts on the main deck (Tr., p. 2221) and on the Mikahal it was made fast through the starboard 'midship chock, and a "bridle" arranged—before any pulling was begun (Tr., p. 1768)—by attaching a 6-inch manila to the 8-inch line back beyond the stern of the steamer and taking it to and through the port 'midship chock, on the opposite side. The purpose of a bridle is "to have the pull on the middle of the ship (steamer) or to have a pull come from the center of gravity, and also to be able to maneuver the ship whatever side you

wanted to carry her, by slacking on the offside one to allow the pull to come on the side you wanted to turn" (Tr., p. 1766). "As soon as we had the line fast the Mikahala started to pull" Macaulay, Tr., p. 2221). Her position while pulling (until near the last) was about three points off the stern of the Ship (Tr., p. 2222). Witness Dowsett added to this that (as *he knew*) the bridle enables a boat to do towing and hold herself in position and *answer her helm* and at the same time not have difficulty with the towing lines (Tr., p. 2158).

With the exception of two short stops (Tr., p. 1767), one of about 20 minutes, on Wednesday morning at 7 A. M., to run a second and separate new 8-inch hawser (Tr., pp. 1767, 2906, 1871-2, 2718) from her port 'mid-ship chock to the Ship (Tr., pp. 1767, 1768, 1872), run the same bitts on the Ship (Tr., p. 1872) and another time at about 7:30 or 8 o'clock Wednesday evening to allow her two lines to be parcelled where crossed by one of the Arcona wires (Tr., p. 1785), the pulling by the Mikahala was continuous (Tr., p. 1767), with variations at times to the extent of using "reduced speed" at low water (Tr., p. 1767).

With respect to the Mikahala's pulling prior to Wednesday night, see the following references:

Macaulay: Tr., p. 222;

Tullett: Tr., pp. 2717, 2662, 2716;

Ekau: Tr., p. 1240.

Against this we have nothing but the brief general statements of the witnesses for the Ship, as follows:

Captain Henry: "Well, there was not a great deal of strain on it; it was in the water most of the time. * * * Well, you *could not put it down* the same as you could the towboat's lines, but you could get a bit of slack on it" (Tr., p. 126).

Commenting on this, we say that no particular time is mentioned, but it apparently relates only to Monday or Tuesday, because there was more than one line on Wednesday. Also, it does not appear whether he made his tests during high or low water.

Lowry: "There was a weight on the Mikahala's line, but nothing very extraordinary." He could press it down three or four inches, but not to the deck. "There was a *slight bight* in that one" (Tr., pp. 269-70).

Now a word about the statements of Captain Henry and Lowry that they "tested" the strain on the lines of the Mikahala (and the Likelike as well) by "putting them down" with their feet. We will give them the benefit of the possibility of doubt that in so testifying they were saying what they *thought* they could do, or they have become confused with some of the other lines. If their statements are to be taken as meant for actual tests with their feet on these lines, we submit the statements are entitled to very little credit. They could not have done any such thing. In the first place, none of the lines of the *Mikahala* or *Likelike* ran over or across any part of the deck. They came through the quarter chocks on either side of the Ship, and the bitts for these chocks are close to the chock openings on the very edge of the main deck. As to the Mikahala lines

on this point see the testimony pages 2221, 1766, 1872; Henry, 120; and as to the Likelike line see the testimony on pages 2227-8, 1784; Henry, 121.

The least familiarity with positions of lines in towing operations would be sufficient to assure anyone that a line made fast to bitts, right down on the deck, would doubtless, on account of the inevitable outside sag of lines of such weight and length, come within one or two inches, at most, of touching, or would actually touch, the outside edge of the open chock, if not altogether rest upon it, even heavily, because of the strain.

It is respectfully submitted that the testimony of foot tests by these witnesses is either under some mistake, or is theoretical, or false. The *Helene's* line, coming from the mizzen mast, where it was fast about 12 inches above the poop deck (see the photograph) ran thence to the edge of the poop deck and there rested on it as it left the Ship, the chock having been torn away when the Mauna Kea line parted. As to that line, of course, it could be put down by the foot to the deck if one went very close to where it rested *on* the deck.

With special reference to the Mikahala's strain on Wednesday night, aside from her maneuvers, which will be hereafter discussed, the following citations to testimony are made:

Kennedy: Tr., pp. 763, 773, 788, 791, 793, 797;
Piltz: Tr., p. 2065;

Dowsett: Tr., pp. 2095, 2097-8, 2134, 2157,
2160-1;

Tullett: Tr., pp. 2662, 2663, 2830;
 Macaulay: Tr., pp. 2293-4.

Even Miller said that the Mikahala was pulling, and the other lines were slack (Tr., pp. 1654-5), but it is evident, on comparing the *time*, that this was just the point where the Mikahala was making her special side pull and the others were slacked for the cutting.

The testimony of the engineers of the Mikahala also covers the point of speed being made that night. The first watch, from 6 to 12 P. M., was that of Devlin, chief engineer (Tr., p. 2862), and he remembered "going ahead on her full speed at 11:30 P. M. and prior to that time they were going at "reduced speed," meaning about three-quarters (Tr., p. 2862), since 7 P. M. (Tr., p. 2126), and when he left his watch at 12 midnight "I was running her full speed ahead" (Tr., p. 2864). He knows further that even after that there was no change until she was eased up about 12:22 or 12:23 (Tr., p. 2865). The first assistant engineer, Christiansen (Tr., p. 2742) had the watch beginning at 12 midnight (Tr., p. 2742), at which time, on going in, he saw that "the engine was going full speed." He "examined the engine and saw that the throttle was open and looking on the steam saw it had the proper amount of pressure on the engine" (Tr., p. 2743). By consent, the record of times and speeds of the Mikahala, from midnight on, was read in evidence (Tr., p. 2746), from which it appears that the first change from full speed was at 12:22, when it ran slow for exactly one minute, and then full speed again until 12:25, when

there was a full stop. At 12:27 full speed ahead again, and 12:28 stopped. We point further to the further testimony that between 12 and 12:22 the engine began going a little faster, that is, making more revolutions per minute (Tr., pp. 2746-7), which, in the case of a pulling vessel increasing her revolutions indicates that the steamer is going forward, as the less resistance allows more revolutions with the same speed (Tr., pp. 2748-9). The application of this evidence is that the Mikahala was pulling full speed on the Ship at the time the Ship began coming off—which was between 12 and 12:22. It follows further that her lines could not have been anything but “as taut as the Mikahala could make them.”

This principle of increase of revolutions, with the decrease of slip, in the case of a vessel pulling on a stationary object, is further elucidated by other engineers. (See Faneuf, Tr., pp. 2761-64; Strohlin, p. 2796.)

There is no evidence at all from any witnesses from the Ship, that the Mikahala was not pulling hard that night. The further maneuvers of the Mikahala, other than pulling, toward the end of the operations, will be separately presented in connection with the manner in which the Ship came off. Altogether the Mikahala pulled about 60 or 61 hours (Tr., p. 1767).

The Helene.

We now similarly refer to the testimony bearing on the maneuvers and pulling done by the Helene.

The Helene left her wharf at 6:30 Tuesday morn-

ing (Tr., p. 2889) and took the 12-inch hawser of the Mauna Kea on Tuesday morning at 7 A. M. (Tr., pp. 2889, 2771-2), the method of transfer being: A 7-inch line of the Helene was made fast to the 12-inch line, back of the Mauna Kea, whereupon the Mauna Kea hove up her anchor and went back. The Helene then slacked out the full length of the 7-inch line and steamed out and laid first her starboard anchor and then proceeded further and laid her port anchor (Nelson, Tr., pp. 2772, 2801), and then hauled back by means of the 7-inch line to within 20 or 30 feet of the end of the 12-inch line the Mauna Kea had left, and then put out two other parts of the 7-inch line through a "thimble," forming a bridle (Tr., p. 2891) and made all three ends fast to the Helene, taking them either side and parcelling them (Tr., p. 2772). Reference to the photograph, Libellant's Exhibit L, will show the way the line was held by the Helene. By "about eight o'clock we were all ready" (Tr., pp. 2772, 3023).

When she was moored and fast in her final position which she maintained during her pulling, until the Ship began to come off) her distance was just 635 feet from the Celtic Chief (Haglund, Tr., p. 2891; Nelson, p. 2775). Each of her anchors weighed 2,000 pounds (Tr., pp. 2772, 2965), her anchor chains being $1\frac{1}{2}$ -inch (Tr., p. 2892). Her starboard anchor had but 90 fathoms of chain, and her port anchor about 60 fathoms (Tr., pp. 2772-3, 2892), the two anchor chains leading out from the Helene forward and about two or three points apart (Tr., pp. 2891, 3143). A "point,"

in marine technology, is $11\frac{1}{2}$ degrees (Tr., pp. 2694, 3142).

Unlike the Mikahala, whose anchor was put out principally to maintain her own position (Haglund, Tr., pp. 2895-6; Tullett, p. 2661; Piltz, p. 1863), the Helene placed her anchors for the express purpose of making her operate as a mooring for the Ship, and to heave on her anchor chains in addition to pulling by her propeller. "In this case that (those) anchors wasn't laid out in that position, Mr. Olson, to hold the Helene; it was placed there for the purpose of holding the Celtic Chief from going on" (Haglund, Tr., pp. 3066, 2895).

Here directing attention particularly to the anchors of the Helene, we point out that Captain Haglund, the superintendent of the Inter-Island Company and in charge of its operations at this stranded vessel, had the Helene anchors thus laid as far as possible from the ship and as directly astern as could be done under the circumstances. The advantage of distance is "The greater the distance, of course, the better hold and more purchase you can get before you drag home" (Tr., p. 2894). Speaking of the Helene's anchors, Captain Piltz testified they were "right astern of the Celtic Chief and right ahead of her naturally, well straight ahead of the Helene" (Tr., p. 1786). He also considered they were "quite a ways out" (Tr., pp. 1774, 1954). The Helene's port anchor was about half a point west of a line dead astern of the ship (Tr., pp. 3141-2). The object was "to put an extra strain on the line; to obtain all the extra pulling power we could get by means of the

winches" (Nelson, Tr., p. 2775). "Big anchors come home where small ones would not on account of being laid farther out"—the bottom being exactly the same as far as known in the case of the Transport Sheridan, according to Captain Haglund's own observation (Haglund, Tr., pp. 2972, 2975). From long practical experience Captain Haglund further tells us: "The further the anchor is away, the smaller the angle will be to the object, and there will be a better hold. An anchor directly down from the ship, even if it were *ten* tons, would not have the same effect as an anchor lying a hundred fathoms away weighing one ton; "that would hold this ship better than an anchor lying close by weighing twenty tons" (Tr., pp. 2966-7; and see p. 3162).

Captain Macaulay says also, concerning his experience in judging weight and effectiveness of anchors: "I can pretty nearly tell how much chain it will take to hold the ship under a certain pressure, when taking into consideration the holding ground in that locality" (depending on the bottom), and the advantage of more chain is that "*There is more weight and it makes a difference in the angle.*" (Tr., p. 2173; and see p. 2976).

Captain Haglund ascribed the difference in power of the Helene over the others as due to a greater pulling power or engine power as well as having her anchors out forward *and using her winches* (Tr., p. 3159)—exerting a pull on her anchors and thereby transporting the strain to her stern lines (Tr., p. 3159).

We will here digress to discuss a comparison made by Captain Haglund of the holding power of the Helene's anchors and that of the Miller anchor, as the testimony in this connection goes further to show the Helene's holding power and the added strain on her lines on account of the use of her anchors and steam donkey. This witness having testified to the advantage of distance as making a less angle to the bottom, and the relative value of heavy anchors near and lighter ones farther out (see above), a question was put to him (Tr., pp. 2966-7) calling for a comparison in holding power between the Helene's anchors and the Miller anchor, weight, distance, etc., considered. Opposite counsel, wishing to prevent the witness being permitted to answer this question, undertook to cross-examine as to qualifications, with the result that the answer was brought out completely and made any further questions on direct unnecessary; the answer being that the Helene's anchors had an advantage over the Miller anchor on account of distance (Tr., p. 2976), and the witness repeated "they certainly would" when the matter of comparative depths of water and elevation of ship's decks, etc., were further particularly mentioned (Tr., p. 2977).

Direct examination having been resumed, the witness was asked *why* the Helen's anchors would have that advantage, and we have, in testimony which we condense from various portions of the examination, both direct and recross, the following reasons from the witness:

In distance from the Ship, the Miller anchor was approximately 670 feet seaward of the Ship (see exact calculation of this by Haglund, Tr., pp. 3063-5 and 2977), and the port anchor of the Helene was 1,165 feet out (Tr., p. 3142); and the starboard anchor being 90 fathoms (the port being 60) was 180 feet further still, or 1,345 feet—about twice as far from the ship as the Miller anchor (Tr., p. 2978).

The depth of water where the Miller anchor lay was about five fathoms (Tr., pp., 3066, 2976), and where the Helene port anchor lay about six fathoms, and her starboard anchor about seven or a little less (Tr., p. 3143), between six and seven (Tr., pp. 2976, 3066). Given in *feet*, the starboard anchor was about 30 feet below sea level and the port anchor about 21 feet (Tr., p. 3144). As the depth of water under the Helene was also about five fathoms (Tr., p. 3065), the plane or incline of the bottom from the Helene's starboard anchor to the 5-fathom depth (where Miller's anchor was and the Helene lay) was, say, at the most 12 feet in a distance of 540 feet (90 fathoms), or a grade of about 2.4 per cent.

The point where Miller's line went over the stern of the Ship was about 35 or 40 feet above sea bottom there (Tr., pp. 3065, 2977).

The height of the Helene's bow where her anchor chains ran out was about 10 feet above water (Tr., p. 3064) and the depth of water there being 5 fathoms, the distance from her bow to the bottom there was about 40 feet (Tr., p. 3064). The height of the lower deck

of the *Helene* where the manila hawser came from the Celtic Chief into the hawsepipes of the *Helene* was only six feet above water (Tr., p. 3216).

The *Helene's* anchor chains weighed about 128 or 129 pounds to the fathom (Tr., p. 3066), which (at 128) would make 11,520 pounds of chain for the starboard anchor and 7,680 pounds of chain for the port anchor, or 19,200 pounds for the two chains together, or 9.6 tons; and this, added to a ton for each of her anchors, would give her approximately a weight of 11.06 tons out ahead of her (And see Tr., p. 2978).

Captain Haglund could not give the weight of the Miller wire per fathom or foot, and was not altogether sure of its size (Tr., p. 3072), but he had an approximate idea of it, sufficient, in his own mind, to make at least a general comparison of the two separate contrivances as a whole. As a matter of fact, the weight of the Miller wire could not begin to equal that of an inch and a half chain, by which is meant that the link, if cut and straightened out, would be one and a half inches thick, the link itself being about four or five inches across (Tr., p. 3073), and its opposite sides separated by a cross-bar of the same thickness (Tr., p. 3073). The chain, if laid out in bars, would be equal to two portions each an inch and a half in diameter, or totaling 3 inches for the two, which would equal 9.42 inches circumference, and its comparative tensile strength and weight added to by the cross-bar inside each link.

With these facts and figures in his mind; Captain Haglund testified as he did in the comparison of the holding power of the Miller and Helene anchors. On cross-examination counsel directed the witness how to draw, in detail, a sketch of the sea bottom, depths, and certain angles by the drawing of certain lines in manner as *he* wanted them, *but not as the witness maintained they should be*, to show the *real angles* to the bottom formed by the respective lines from the anchors. The sketch obtained is in no sense representative of the witness' opinion or testimony concerning these angles, because it excludes factors which the witness insists did form part of the actual conditions in operation. We point out here that *counsel*, through the witness, thus drew a straight line from the bow of the Helene to her anchor on the bottom to represent the Helene's anchor line, and insisted that the angle formed by *that* line with the bottom was the angle to be used in comparison with the Miller angle. (See Tr., pp. 3069, 3070-72.) Of course, the witness could only answer in the affirmative the questions which were then based upon the *hypothetical* drawing, such as that on page 3071, namely: "Now then, Captain, in so far as the anchor is concerned in each case the angle of a line from the anchor itself, from the Miller anchor to the Celtic Chief, is somewhat smaller than the angle formed by a *straight line* from the Helene's starboard anchor *to the Helene's bow*, isn't that true?" The affirmative answer seemed so valuable to counsel that he sought to have it repeated, for which purpose he repeated the

same question, and the witness answered this time that it would be so "*providing the chain would be held as taut as a wire*" (Tr., p. 3072). As a matter of fact, the Miller wire could be drawn far more in a straight line, if made taut, than anchor chains could be. The question was not a fair one, on the facts, and was put with design to prevent anything but an affirmative answer to it in that form. Another question, equally distant from the facts and devoid of a fair opportunity then given the witness to give a true answer consistently with the facts in the case, follows on page 3072, when he asked: "Now, the purchase that the Helene's anchor would get by virtue of the angle, *aside from the question of the weight of the anchor chain*, would not be any greater or better than that of the Miller anchor, would it, *aside, I say, from the weight of the anchor chain?*" The answer wasn't satisfactory to the questioner, either.

Counsel did not really *want* any opinions from this witness about comparative holding powers and objected to anything but "yes" or "no" answers. For example, again, see Tr., pp. 2971-74.

On cross-examination by counsel for Miller Salvage Company, Captain Haglund said that if there was "a straight line drawn from the *Celtic Chief* to the Helene's anchor the angle would be smaller," and that would be *one* of the reasons why the holding power was greater. Size of anchors would have a great deal to do with it "if they lay in the same place." "It all depends what cables there are on her. If they had a

similar chain, similar weight on the chain, similar distance, under similar conditions of bottom, then the greater weight would have the best hold, but under those conditions at the Celtic Chief the Helene anchor was twice as far from the Celtic Chief as the Miller anchor; Helene had a greater weight out" (Tr., pp. 3160-61). And she had *11.6 tons*, besides double the the distance. As a matter of fact, in view of the weight of the Helene's anchor chain, the witness said "the chain formed *no* angle to the bottom" (Tr., p. 3160), the chain being really lying flat on and along the bottom for some distance from the anchor (See Tr., pp. 2978-9). But a wire, under water, even if drawn taut, would form at least a small angle.

Now, coming back to the sketch drawn by counsel through the witness, the witness was asked on re-direct examination, "what elements or factors do you take into consideration to determine what would be the angle formed by an anchor line or chain with the bottom," to which the witness replied: "The factors to be considered in this would be the distance and the weight of the cables from the object it was fast to" (Tr., p. 3202). The witness was then further asked, with respect to counsel's sketch produced through the pencil held by the witness, "Between what points would you indicate a line should be drawn to ascertain the real angle formed even *on a straight line theory* with the bottom by the Helene anchor chain?" (Tr., p. 3202), and the reply was, "It should have been drawn *from the stern of the Celtic Chief to the Helene's anchor*, as well

(meaning in the same way) as the straight line from the Celtic Chief to the Miller anchor. The Helene is merely acting as a buoy to the connection between the Celtic Chief and her anchor here on that angle" (Tr., p. 3204). The witness then drew in red ink a line to indicate his own opinion and testimony on the subject of the proper angle. In no other respect does the exhibit in question bear out any testimony of the witness as to angles for the Helene anchor.

On still further cross-examination Captain Haglund replied positively that a straight line drawn from the Helene's anchor to the stern of the ship would *not* run under the Helene, the sketch (and red line) being inaccurate, the map having been drawn only roughly—scale or no scale by the *ruler* used—and he maintained this as his real and only opinion (Tr., pp. 3218-19). We add that we have ourselves made a large scale drawing of the small sketch in evidence, and find that the straight red line really passes through the lower part of the Helene's bottom near the stern.

Even Libellee's own witness, Lowry, says that if the pulling vessels had their anchors down, "then it would be practically the same thing as Captain Miller's anchor" Tr., p. 310); saying also that although he had testified that the best means of getting a vessel off a reef is by an anchor astern, "the same principle applies to a ship that has both her anchors down and heaving on them—it is the same thing" (Tr., p. 318). See also: Lonche: "Having an anchor over the bow of the steamers pulling would have the same effect" (Tr., p. 499).

Add to this the fact that the horse-power of the Helene's steam winch was about 45 (Haglund, Tr., p. 3115), which could be utilized directly on the anchor chains and was consequently resolved into that much actual pull on the Ship in addition to anchor and propeller power.

And there is still another factor of force where a vessel is both pulling and heaving on her anchors—that of the lateral power exerted on the line by the vessel being considerably lifted by the swell, tending to draw the ends toward each other in consequence of the center being displaced. See the allusion of Captain Haglund, page 3203, to the Helene acting as a buoy or weight on the bight. Also page 3212. As there would be some downward bight in the line as a whole, the tendency of the swell to raise the vessel would, in the first instance, enable a few links to be taken in on the chain until no more could be had that way, and then the pull would react on the ship ashore. See, on page 3169, the question: "What was there that would add to her power, pull, in the condition of the sea that prevailed about the Celtic Chief?"—and the answer: "The way the ship (Likelike) moved up in the bight that existed between the Celtic Chief and her anchor"—the rise and fall—of the ship (Likelike) itself. Also the further testimony that the added force so given would depend upon the amount of rise and fall, which was sometimes as much as 15 or 16 feet and more (Tr., p. 3169). "At the time she raised up it would be greater strain" (Tr.,

p. 3170). It might even be great enough to part the line (Tr., pp. 2431-2).

We refer also, for yet another element of power, to the practical force given by the towing steamer working in the swell, this subject being separately presented under the head of the general pulling of all the steamers.

Therefore, it will be apparent from the testimony as a whole with respect to the strain on the Helene hawser, she was able to remove all question of any material bight in her line (being thus different from where the anchor chains are not used for heaving) and able at times to make her line "perfectly taut," "straight out," "through the air" (Tr., p. 2716). And although the Mikahala's lines were "taut" (Tr., p. 2716), they were "not as taut as fiddle strings" because her anchor *did not have* "to hold in the same strain that the Helene and Likelike did" (Tullett, Tr., p. 2716). Captain Tullett was prepared to say that "the Helene and the Likelike by means of their anchors were able to bring their lines out straight in the air like fiddle strings" (Tr., p. 2716).

The Helene used her "*steam engine*" (Tr., p. 2800) on each anchor chain, taking in a link every time it could be gotten (Nelson, Tr., pp. 2775, 2801-11; Haglund, p. 3025), and we submit it is clear that if only one link or two could be gotten from time to time, with a 45 horse-power steam donkey (Tr., p. 3115) the strain certainly must have been great and the bight practically eliminated if "*just one more link*"—6 to 8 inches—

could not be gotten on an entire line from the Ship to the anchor of about 1,345 feet. In the opinion of Weisbarth, there was enough anchor chain out to enable the steamers "to hold whatever they made" (Tr., pp. 714-15).

Other references to testimony of the strain on the Helene's line, prior to the final pull on Wednesday night, are the following:

Nelson: Tr., pp. 2773, 2820.

Henry: Tr., p. 127 (And we think we may say, in view of Capt. Henry's testimony as a whole, that the "times" when there was *not* a "good bit of a strain" were at low water).

Lowry: Tr., p. 270 (Lowry's foot-testing of this line should be considered in the light of the fact that the chock had been torn away by the Mauna Kea's line, and the line therefore lay flat down on and along the deck at the poop where it went over).

Haglund: Tr., pp. 3023, 3214, 3215, 3217, 2926.

Capt. Macaulay did not testify as to the Helene line apart from the others (and did *not* testify as counsel represented to Nelson on Tr., p. 2811), and his testimony is therefore cited below as to the pulling collectively.

Capt. Nelson thought that the Helene line could not have been brought out of the water even with her pulling at full speed or heaving in on her anchor chains (Tr., p. 2812), and if others testified that she could they were wrong in his judgment.

We submit, as to this testimony, that it does not tally with the weight of the rest, nor with the actual photograph of the Helene line shown by Libellant's Exhibit

L, which, shown to Capt. Haglund, the latter testified that at least 200 to 250 feet of her line are there shown (Tr., p. 2906); and we think that in view of the fact that the line was lower at the Helene end, 6 feet above water as against 19 at the Ship, the worst of the bight is shown in the photograph, and if the line were touching the water at all it would have done it inside the range shown by the picture. It is also inconsistent with his testimony on Tr., p. 2773.

Counsel having heretofore argued* that the Helene was not using her propellers when the Ship came off, citing Tr., p. 2831, we submit that the witness clearly meant that *after* she was off they stopped the engine, and later went ahead after her line had been cut. The following further testimony will make this clear:

Tullett: Observed the lines of the Helene and Likelike "practically all the time," and they were "perfectly tight" (Tr., pp. 2662-3).

Nelson: "We didn't start to pull full speed until towards eleven o'clock on Wednesday night when it was approaching high tide," and having then started full speed we "continued at full speed until the vessel began to move, until she came off clear of the land" (Tr., p. 2774). He knows he gave the signal to the engineer for full speed (Tr., pp. 2798-9), and that the speed was immediately increased (Tr., p. 2799).

And the windlass of the Helene *was used*, heaving on her anchor chains Wednesday night (Nelson, Tr., pp. 2802-2811; Haglund, Tr., p. 2894), and it was "a sort of continuous operation after about ten minutes, five or

*And still so argue in their brief, p. 95.

ten minutes before twelve" (Tr., p. 2807), * * * as fast as we could get in the chain. It was a continuous occasion" (Tr., p. 2808).

The testimony of Lycett, the engineer of the *Helene*, is also conclusive on the point of her pulling on Wednesday night. As chief engineer his watch that night was from 8 to 12 (Tr., p. 2853). Independently of the log, and without looking at it at all, he remembered that the engine was "going full speed from about eleven o'clock until she came off;" and although there were variations before eleven o'clock,—“from eleven o'clock on we had full speed,” and she came off at 12:22 (Lycett, Tr., pp. 2854-5).

Although Lycett's watch ended at 12 o'clock that night he went from the engine room up on deck right next to the skylight over the engine room, and from there was watching and hearing the engines all the time, and his answers are positive that there was no change of the engine until the Ship was off (Tr., p. 2855). Had there been any change of throttle he would have noticed it, not only by the sound, but he could see the throttle from his position above (Tr., p. 2857).

We offered the log in order that the entries for the watch following 12 o'clock might be admitted, in the absence from the *Territory of Reid* the engineer, who had that watch (Tr., p. 2857), but our case was inadvertently closed without it having been marked except for identification. It is immaterial, however, as Lycett himself testified personally, all of his own knowledge and independently of the log, as to the whole time up

to the Ship coming off. Lycett further testified that prior to eleven o'clock the speed was three-quarters, but there were no stops made in his watch (Tr., pp. 2857-8), the stop having been around *noon* of that day (Tr., p. 2858).

The Likelike:

The Likelike came out a little before noon on Wednesday (Tr., pp. 1784, 2814, 3021, 121), and by noon had laid her anchor about two points on the port quarter of the Ship, astern (Tr., p. 3165), ahead of herself, and passed an 8-inch Manila hawser (Tr., pp. 3158, 121), to the Ship, which was made fast through the port quarter hawse pipe to the main deck bitts (Tr., pp. 1784, 2228, 121). A bowline was then run from the Likelike to the starboard side of the Helene, and the Likelike hove up closer to the Helene, bringing the Likelike up to and possibly a little to eastward of her own line with her anchor, this having been done to avoid the current, the Helene being the larger vessel (Tr., p. 3165). The effect of this maneuver was to get the Likelike in a position where her power would be affected by the swell as little as possible, thus increasing her power as a pulling agent. It also added to the side pull or weight on the Helene line. Then the Likelike hove her anchor chain as taut as they could get it (Haglund, Tr. p. 3166). Capt. Haglund both saw the position of the anchor chain and heard the heaving on it (Tr., p. 3166).

See also Capt. Macaulay's sketch showing the Like-like anchor (Libellant's Exhibit G).

As to pulling by the Likelike before the night pull, see:

Tullett: Tr., pp. 2716, 2663;
 Haglund: Tr., pp. 3156-7, 3164, 3168-70;
 Henry: Tr., p. 127;
 Lowry: Tr., p. 271.

To this we say that if there was a "slight bight" only, the line was *remarkably taut*.

With regard to "testing" of the Likelike's lines by Captain Henry and Lowry, we refer back to our remarks on this subject with respect to their testing the Mikahala's lines. The Likelike line was taken through the port quarter hawse pipe and made fast to the bitts *right there* (Macaulay, Tr., p. 2228; Henry, Tr., p. 121). It follows that they were not where they could be pressed down to the deck, any more than the Mikahala lines could have been.

Haglund also refers to the rise and fall of the Like-like as adding to her power, as already noted above (Tr., pp. 3168-70). This strain was being exerted by her "during all the time she was going full speed" (Tr., p. 3170).

Note also the photograph (Libellant's Exhibit L), showing the Likelike line. Capt. Haglund said of this photograph that the Helene's line there shown is about 200 to 250 feet long, and "the Likelike line shows a bit longer" (Tr., p. 2906). Manifestly it showed longer because viewed at a more acute angle. Hence about

half her line is there shown *out of the water*, her whole line being 575 or 580 feet long (Haglund, Tr., p. 2907).

The night pulling by the Likelike appears as follows:

Haglund: Tr., p. 3170;

Faneuf: Tr., pp. 2757-59;

Strohlin: Tr., pp. 2757, 2794, 2795, 2796.

Strohlin then proceeded to describe the "speeding up" and explained its meaning (Tr., pp. 2796-7), as heretofore already indicated in this brief, meaning the Likelike had begun to move forward in her pulling, and hence that she was *pulling* at full speed when the ship came off.

Having now reviewed the testimony especially relating to the pulling by the steamers separately, we indicate the following general testimony covering their pulling and strains taken as a combined power on Wednesday night:

Lonche: Tr., p. 617;

Kennedy: Tr., p. 761 (at nine o'clock), 761, 763, 773 (later);

Bray: Tr., p. 858;

Piltz: Tr., p. 1783;

Macaulay: Tr., pp. 2293-4, 2299-2300-2301, 2317, 2516, 2576.

As to the testimony of several witnesses in the case not cited above on the subject of pulling and strains by the steamers, we have to say that they did not in fact have knowledge sufficient to make their opinions or even their impressions of any value, because upon their own statements they did not observe and could not have known. See the following:

Capt. Henry: As this witness *did* express opinions, we will first quote and then discuss them:

Asked if, as a result of the second red light being put up he noticed anything with regard to the Inter-Island lines, he replied: "No, I did not" (Tr., p. 221). Read this in connection with what he said on page 224, Transcript: "Well, as I said before, there was times when the line was in the water and times when it was out of the water. I never saw any difference with their hawsers whether the lights were up or not;"—and we have *no statement* that they were *not pulling*.

Take his answer above quoted that he did not "notice" any change after the second red light went up, and then his answer,—when asked: "When you had those two red lights up to pull ahead, were they not pulling?"—"I don't know; they were the same as before when the red lights were not up," (see page 225, Transcript), and couple it with the last answer there immediately preceding, (relating to the time before the second light was up): "At times they were "taut" and at times they were not"—and, we submit there is nothing here on which to base any claim that Capt. Henry has testified that the steamers were not pulling. He admits that "at times they were taut and at times they were not,"—both before and after and at all times during the operations. Aside from his saying of each of the separate steamer lines that "it had a good bit of strain on it too, but at times there was not;" (Helene, Tr., p. 127), or "you could not put it down * * * but you could get a bit of slack out of it;" (Mikahala, Tr., p. 126); or, as to the Likelike, and all of them: "If there was a good

strain they would have been out of the water (Tr., p. 127),—we submit there is no testimony at all of what he *knew* or opined.

What Captain Henry *didn't know*, is evidenced by the following:

He had admitted that he could observe those lines as they came aboard his Ship, and could observe their condition, and was then asked:

“Q. That told you whether there was power exerted, didn't it?

“A. Well, it would, yes.

“Q. Well, on Tuesday night were not those vessels exerting power on your vessel?

“A. Yes, to some extent.

“Q. Well, how much?

“A. *I cannot tell.*

“Q. Well, a little power or a great deal of power?

“A. *I do not know what power they had on; I could not say how much power they had on*” (Tr., p. 225).

“Q. Well, did you not notice those lines all the time?

“A. *No, not all the time*” (Tr., p. 184).

“Well, the lights were there for them to pull, *but I don't know whether they pulled or not*” (Tr., p. 224).

“Q. Who was pulling on the Celtic Chief *at the time she began moving and until she came off*?

“A. There was the cruiser Arcona and Capt. Miller taking in the slack of his line from the anchor and the three tugs from the Inter-Island.

“Q. The three steamers you mean?

“A. Yes, three steamers rather.

“Q. *Did you observe the lines of the Inter-Island boats?*

"A. *No, I did not observe them at that time*" (Tr., p. 141).

"At that time" means during the whole period from the time the Ship began *and until* she came off. This more clearly appears from the next quotation:

"After the *search-lights were turned on*, on the evening of December 8th, *did you notice the lines attached to the Mikahala, the Helene, and the Likelike?*"

"A. *Well, I did notice them but I did not take much notice of them.*"

"Q. *Well, round about eleven o'clock, was there a strain upon those lines at that time?*"

"A. *I could not say.*"

"Q. *You don't know?*"

"A. *No, I could not say.*" (See page 198, Transcript.)

Lowry didn't know:

Lowry *slept* from 10 o'clock until 11:30 (Lowry, Tr., pp. 274-5). At 11:30 he came on deck again and went forward (Tr., p. 212), and from 11:30 o'clock was on the forecastle (Tr., pp. 288, 275).

Add to this the following:

"Q. What was the condition of affairs when you came out again at half past eleven o'clock, after you had your sleep?"

"A. They were preparing to make a hard pull with all the tugs. *But I didn't know*; I went away forward to stand by the anchor; we expected her to go off then.

"Q. Do you know how much of a strain there was on the various lines from the time she began to move until the time she came off?"

"A. No, I was forward then and I don't know anything about what happened aft" (Tr., p. 275).

What, then, we ask, is the value of any of the testimony of Lowry of how he "tested" the lines,—all of which was before 10 o'clock, when he went off to sleep?

Lonche didn't know:

His testimony on pages 513-15, Transcript, shows that his idea that the steamers were "only pulling half speed" was based on his understanding that there was an arrangement that they would not pull beyond half speed until the light went up, and he said elsewhere that the second red light did not go up until the Ship was off. He admitted that he did not know of his own knowledge at all.

He knew there was a maze of lines: "There was not a chock aboard the Ship but what there was a wire on there barring the one amidships.

"Q. You really didn't know definitely to what vessels the different lines belonged?

"A. No, sir, barring the one, the one on the starboard side, * * *

"Q. You wouldn't venture to say anything about any other wire, as to what ship it belonged, what steamer?

"A. Hardly, sir" (Tr., p. 552).

Weisbarth didn't know:

He did not go on the poop until the lieutenant did, at which time the Ship was already actually afloat, and he then saw all of the lines slack in the water, and from that judged that they had not been pulling (Tr., p. 650).

Mason didn't know:

"Q. Just before that time (when Miller's block 'dropped'), I'm asking you how these boats were pulling?

"A. They was pulling—

"Q. Slow speed, full speed, half speed?

"A. I don't know anything about that. * * * I don't know. They might be slow speed, might be full speed. It's up to them of course. I have no occasion to go around them steamers" (Tr., p. 902).

Clarke didn't know:

Referring to the time he felt the 'jump,' was asked:
(Tr., p. 1120)

"You weren't noticing particularly what the steamers were doing? the ships?

"A. No. I didn't take no notice * * * at all.

"Q. Didn't know what they were doing?

"A. No."

And on page 1171, Transcript: He didn't know, or notice, or observe, whether any of the steamers were pulling, and was not willing to say what they did or didn't do, and for all he knew they may have been pulling their best speed.

Clarke was a very uncertain sort of witness in any event, judging from his befogged insistence that he saw or heard the Mauna Kea line break,—first on Wednesday when he said the Arcona came out (when the Mauna Kea wasn't there) (see Tr., p. 1074), then Tuesday (when he himself wasn't there at all), and when he said that on Monday he was rigging the Miller

tackle (which wasn't rigged until Wednesday). (See Tr., pp. 1072-9, 1135, 1137-8).

Moses Ekau didn't know:

He saw only the Mikahala. To the others he didn't pay attention (Tr., p. 1260). He didn't even know what the Mikahala was doing (although she "was right in front of my face when I was looking (Tr., p. 1260), and didn't look on the other side to see the others" (Tr., p. 1269).

Capt. Miller: On his own testimony of the duration of that sandwich supper, he could not have known much about what the vessels were doing toward the last, and he said that he was down in the cabin and didn't know what they were doing just prior to the signals (Tr., p. 1391). Also, that in the interval of fifteen or twenty minutes or half an hour immediately prior to the second bump (when the Ship came clear off according to his own testimony), he didn't know what the steamers were doing, and they may have been pulling hard all the time for all he knew (Tr., pp. 1652-3).

Capt. Schroeder didn't know:

"At first when I arrived with the Arcona I saw the steamers going full speed ahead. Then they decreased their speed until the Arcona herself moved her engines. At that time they went full speed. *During the latter part of the afternoon I do not remember what efforts the steamers made. During the night I do not know what they did*" (Tr., p. 388).

We point out that Capt. Schroeder's answer to direct interrogatory No. 12, where he said the three steamers

were moving their engines but scarcely tightening their hawsers, related to the time of his first examination, which was at about 9 o'clock on Tuesday morning (Tr., p. 390). The tide tables admitted in evidence in this case show that it was low tide at 8 o'clock that morning. This accords with the testimony elsewhere that at low tide the steamers did not go full speed, it being practically useless to attempt to do at low tide what they could not do at full tide up to that time.

It is a further fact, as a practical matter, where one vessel is towing on another which is stranded, there being considerable swell of the sea, that the weight of the towing vessel adds its comparative immobility or dead weight to the force exerted on the vessel, proportionately according to the size and weight of the towing vessel and the force of the swells. This operates in two useful ways for the benefit of the vessel ashore: First, the mere inertia of the towing vessel adds to the "weight" on the line, that is, the inertia of a large body cannot be as easily overcome and forced back, as in the case of a smaller one. It takes more swell and more force to make the towing vessel "give" in the direction of the stranded ship. It is in a sense a "floating anchor" which will not give readily, especially when it is supplemented and steadied by the towing vessel's own anchors out ahead.

In the second place, the working of the towing vessel in the swell amounts to a more or less continuous application of the weight of the towing vessel by its being alternately forced back by the swell, ever so

slightly perhaps, and then thrown forward again by means of the propeller until the weight thus moving forward is checked by the line. Thus the weight of the vessel (and contents), as well as the effective power of the propeller, is put directly on the line.

We are aware that Mr. Keech, unquestionably an expert in the matter of engines and their powers *as engines* operating in *still water*, doubts the idea that the pulling vessel has greater power when working in the open sea in a swell rather than in still water. All of his calculations of the actual or *useful* power of the engines of the Inter-Island steamers were made on the theory that the vessels are operating in smooth water (Tr., p. 3332), and without jerking. He even thought the steamer might in a rough sea have to use most of her power in maintaining her own position (Tr., p. 3332). But he admitted that there would be "quite a strain heaving on the line," but he would not regard it as a useful strain,—rather a "breaking strain" which could not be materially transmitted to the ship ashore,—"although I admit that it does sometimes help a little, not much" (Tr., p. 3332). In other words he would call it jerking rather than straining. As to jerking he was frank to say, "A jerk of that sort is often best to accomplish exactly what they are after, making a start" (Tr., pp. 3332-3), although his own faith in the effectiveness of such attempts is more like skepticism than faith. Further discussing the same question of what force can thus be brought into the line and upon the vessel, assuming it does not break, he said that he could

not say how much it would be nor did he think anyone else would be able to do so. We agree with him that without absolute knowledge of many indeterminable factors, the effective force could not well be calculated. But he says of the force, whatever it may be, "It's brought into the line" (Tr., p. 3334), but perhaps not all on the vessel. Some of it is doubtless lost in the elasticity of the line. Mr. Keech has his scientific theory of this matter, and he admits a power is there, that neither he nor anyone else can assume to measure. He deems it more or less inconsequential. But practical seafaring men of long years' experience do *not* deem it inconsequential. They know it is there, though none of them will assume to say what it amounts to. But they rely upon it and resort to it at every opportunity. Even Mr. Keech said, "It's tried because it is always tried" (Tr., p. 3333).

Certainly the Mauna Kea was able by a "jump" to break her big 12-inch line the second time, and, by the evidence, the breaking strain of a 12-inch manila is 56.4 tons (Tubbs, Tr., p. 1666). Even if, as counsel tried to make Captain Macaulay admit was possible, the first breaking of the Mauna Kea line might have been caused by the motion of the swell in forcing her back and then going forward again to recover her position (see Tr., p. 2418), we submit, would this not all the more indicate the great force which must be there, and which must have been more or less continuous in that steady pulling the Mauna Kea was doing then when the line *didn't* break?

Before proceeding to cite to the Court what the *seamen* think of this force, we wish to refer to the evidence of the actual useful thrust of the Inter-Island steamers in connection with opposite counsel's "five-ton block on a wharf" theory.

In a number of instances during the trial counsel put to witnesses the question of whether a given vessel could pull a five-ton block from a wharf, the conditions being that the test is made in *smooth* water (i.e.—see Tr., p. 1855). The object of these questions was, we think, to lay a foundation for subsequent challenge of the credibility of the witnesses who answered in the affirmative, by introducing the mathematical calculations of the actual useful power of the given vessel to pull in *smooth* water, as was put in by Keech. There is no question made of the correctness of the calculations made by Mr. Keech, as they tallied practically with those we have ourselves made by use of the formula and rule for deduction for losses stated to him on page 3330, Transcript, and which he said was the formula generally used. By those calculations and deductions, the evidence in this case is, that the indicated horse-powers and real pulling power in tons of the steamers are as follows:

<i>Vessel.</i>	<i>Indic. H. P.</i>	<i>Useful or Effective Thrust, in tons.</i>	
		<i>Tied up.</i>	<i>Running free.</i>
Mauna Kea	2400 (3325)	12.165 (3326)	same
Helene	470 (3317)	3.11 (3318)	3.26 (3317-18)
Mikahala	404 (3324)	2.977 (3324)	2.946 (3324)
Likeliike	340 (3325)	2.56 (3325)	2.463 (3325)

(Note: Figures in parentheses indicate Transcript pages.)

Not having had the pitch of the Intrepid's propeller, we cannot figure her useful power.

Mr. Keech further admitted, on cross-examination, that the power running free and tied up are "somewheres near alike" (Tr., p. 3336); and either may be greater than the other, depending on the particular vessel.

It will be seen that counsel thought to show that Capt. Nelson ventured beyond his depth when he assumed to say that the Helene could pull the five-ton block off a wharf, in view of the calculation that her actual power in smooth water was only 3.26 tons at the most.

But the seamen, while not posing as "living encyclopedias" (Macaulay, Tr., p. 2357), and unwilling to say positively that such and such a thing could be done by a certain vessel, say, nevertheless, that whatever may be the power in *smooth* water, in the open sea and swell it is a *different matter*. Macaulay said, "I don't see any similarity in the case at all" (Tr., p. 2357).

He was certain, however, it "would be easy money" for the Mauna Kea to pull off a five-ton block (Tr., p. 2357), and in this he was safe because *her* calculated useful power was over 12 tons.

While we had not thought that counsel could go to the extent of suggesting that with a vessel ashore the pulling steamers would have to move the *whole weight* of the vessel, we think it well, in view of the question he put to Captain Macaulay about the Chiusa Maru weighing 900 tons and whether he thought the steamers there could pull off a 900-ton object, (see Tr., pp.

2358-9), to point out Capt. Macaulay's answer that the steamers didn't have to move any 900 tons but only the portion of her weight (whatever that may have been) not supported by the buoyancy of the water. As a matter of fact, in the case of a vessel aground, the pulling agencies must be able to move a weight equal to the difference between the weight of the object itself to be moved and the weight of the water it actually displaces. Hardly, theretofore, had we thought it might be argued in the present case that the pulling steamers had to move the entire weight of the Celtic Chief and cargo, as though she were high and dry.

Tullett said the Mikahala could pull off a three-ton object, because he had himself in actual experience pulled off with her a boat full of sand, from a beach (which is nothing like a smooth wharf), the boat and contents having weighed about four or five tons (Tr., p. 2718).

Capt. Haglund knew the "smooth water theory" as well as the work in a swell. When asked as to the amount of strain he thought was actually exerted by the Likelike, he said, "It all depends on the motion of the ship (Likelike) *along with* her horse-power used on the engine *and also* what power she exerted on the anchor chain" (Tr., p. 3167). How much that was he couldn't state, but in his judgment it must have been about 20 tons all combined (Tr., p. 3167). Given the "smooth water" question as to the tons of strain the Likelike could transfer to a fixed object, he said, "She couldn't exert very much power *towing in smooth*

water. I can't state exactly—but in the neighborhood of *three tons*" (Tr., p. 3167). He wasn't *far* wrong, as it was figured by Keech at 2.56 tons tied (see above), and Keech says further, "Of course it varies according to the quality of the machinery" (Tr., p. 3320).

So Capt. Haglund was asked further:

"What is the difference between towing in smooth water and water such as that that prevailed about the Celtic Chief?"

His answer was,

"A great deal of difference."

"Q. Well, what is the difference?"

"A. *The momentum of the ship, the whole weight of the ship in the seaway will add its weight to the towing hawser*" (Tr., p. 3168).

And again: He knew the Helene had more power than the Likelike because, among other reasons given, she was a heavier ship, and had in her besides about a hundred tons of saltpeter (Tr., p. 3170).

What, otherwise, did Connemann mean when he said, "This strain (of the Arcona) was further increased by the working of the Arcona in the swell?" (Tr., p. 421); and again: that the Arcona lines were taut "especially when the Celtic Chief and the Arcona were working in the swell" (Tr., p. 425).

As the Arcona was not using her propellers her weight was not thrown *forward* between incoming swells.

If in actual practice only the mechanical factors of the engine and not the weight of the pulling vessel would count in effectiveness of pulling, then a 500-h. p.

engine would be as effective whether on an ocean liner or a sampan.

Furthermore, all of Keech's testimony is applicable to propeller power only, and this should be carefully borne in mind. It also makes the "five-ton block on a wharf" theory *strictly* theoretical when we are in fact dealing with several added agencies of power, and, be it said, too, that while a towing vessel, towing free, may not be able to exert a steady or even strain *by towing alone*, yet, when that vessel is steadied by her own anchors she gets practically the full benefit of her propeller power to supplement anchor strain and heaving.

Counsel's discussions of effective power have heretofore been with respect to propeller power only, anchors not being considered. We need merely remind the Court of the testimony regarding the power exerted by the Inter-Island vessels by heaving on their anchors, elsewhere presented.

Another point respecting pulling and conditions of lines: When is a line taut? When is a "straight line" not a straight line?

We submit that when any witness, on any side of the case, talks of a line being taut, tight, straight out, like a fiddle string, etc., he is using a relative term. It is impossible as a physical matter for a line stretched between two points and otherwise unsupported to be really straight between the two points. A seaman will say a line is straight when it is straight as in practice or possibility it can be gotten. It is impossible for a line to be "exactly straight;" there must be "*some* sag to it" (Nelson, Tr., p. 2814). Capt. Henry of the Ship, ventured

farther than any other witness. He said "No, not impossible at all" (Tr., p. 200), "as long as there is no seaway" (Tr., p. 200). But he didn't mean straight "*all* the time" (Tr., p. 201).

See "Almost straight, once in a while a sag; touch down and come out" (Kennedy, pp. 788-9). "It couldn't be an absolutely straight line" (Kennedy, Tr., p. 790). Nelson thought the *Helene* could not get her line out (Tr., pp. 2811-12), but Henry thought otherwise "if she had strained" (Tr., p. 127). Nelson is alone in his opinion in that regard.

Lines can be kept out of the water "in a smooth sea," but not easy to do in a seaway (Henry, Tr., p. 200).

Piltz maintained that Mauna Kea could and *did* keep her line more in than out of the water,—perhaps because she had her anchor down. (See Tr., pp. 1925-28).

DANGER TO INTER-ISLAND STEAMERS.

It is not claimed that in these salvage operations there was any extreme or imminent danger to the steamers of the Inter-Island Company. They were not in "great danger" (Tr., p. 2985), but were in "some danger" (Tr., p. 2680), in that they were working under conditions which kept an ever-present possibility of danger of breaking of lines which might foul the propellers, to a degree not ordinarily attendant upon the operations of steamers (Tr., pp. 1824, 2286-7). They were towing in the first place, and a towing steamer always faces the danger, always of the uncertain kind, where

“it may be all right” (Tr., p. 3131), but where one “couldn’t say” (Tr., p. 3131). The danger exists even with one steamer pulling on its own line, and here were many vessels and many lines, and there was actual breaking of lines at different times. Whether or not a line will, on breaking, be likely or unlikely to get into a propeller, depends on various conditions. If a line breaks some distance from the propeller the break leaves a more or less long part of loose hawser floating in the water, and if the break should throw or whip it forward toward the side of the pulling steamer its tendency would be to move with the suction of the propeller and it would almost certainly be drawn in and foul if not break the propeller. Stopping the propeller might ordinarily avert the danger, and ordinarily it can or *could* be stopped, just as every witness has admitted; but every witness has also said one “couldn’t say” *how soon* the engine could be stopped. They even say it is probable that it *could* be stopped within a few seconds perhaps, if every condition on the bridge and the engine room were favorable to instant action. But there are always the unforeseen possibilities that could intervene. The danger of lines getting into propellers, not so much if the break is a fair distance away from the propeller, becomes more serious if the break is a close one. It might happen “almost instantly” (Tr., p. 2681). A short piece could snap back in “less than a second” (Tr., p. 2988), and the damage would be done before a move could be made to avert it. Capt. Haglund has seen lines broken and fouled with propellers “many times” with the “same kind of boats” (Tr., p.

2987). Tullett saw a brand new line do it (Tr., p. 2715). That was no place for a vessel to drift.

Incident to the danger above discussed is the consequent one of a possible collision among the different vessels, were the line of one of them to break (Tr., pp. 1824, 2286-7). This was more or less remote, no doubt, but was not only a possible danger, but one that nothing would justify its being run except in salving. The *Likeline* was probably safe from it more than any other, being farthest down in the lee of current and swell, but the *Helene* *could* have been a danger to her were the *Helene* to drift down. The *Helene* was probably in little, also, as the *Arcona* would have swung clear. The *Mikahala* was in more danger than any of the others, on account of the *Arcona*. Had the *Arcona* heaved on her anchor chain she would have brought not herself but her *lines* over to the *Mikahala*, as before indicated, in which case the *Arcona* herself would probably have swung ahead of the *Mikahala* as her stern was forward of the *Mikahala*'s bow as it was. (See Tr., pp. 1831-5, 3060.) The other danger to the *Mikahala* from the *Arcona* was that of the *Mikahala* breaking her line and swinging to her anchor and being carried by the current and swell over to and against the *Arcona* (Tr., pp. 2680, 2710-13), and this might have been accomplished in perhaps three or four minutes (Tr., pp. 3126, 3207). With the *Arcona*'s stern lines fast to her quarter bitts, as heretofore shown, there would not have been time for the *Arcona* to have steamed ahead and averted a collision, as counsel

thought would be the thing for her to do (Tr., pp. 3124-7).

Certainly the Arcona's officers were afraid of the breaking of lines which might have fouled her propellers,—a fear that was almost craven. Whatever the degree of danger may have been, the Arcona *refused to run it*. Had every Inter-Island steamer taken the same position the Ship would never have been pulled off.

SUMMARY.

The Inter-Island operations were undertaken and carried out with expedition, system and skill and under the direction of Capt. Haglund, the Inter-Island Superintendent, who made no false moves, but rather showed a valuable practical application of his own experience in salving with Inter-Island steamers.

It having been seen that the Mauna Kea could not pull the Ship off, nor start her with a jerk, laden as she was, and that more lightering was necessary and that this would take time, Captain Haglund had the Helene replace the Mauna Kea and lay both of her anchors well ahead to serve both as an anchor to prevent the Ship going farther in when lightening would otherwise permit it (Haglund, Tr., pp. 3066, 2894-5), and the Helene to use her propeller and winches on her anchor chains as best possible all the time. The Helene got out there about seven o'clock (Tr., pp. 2889, 2771), and was moored with her two anchors and her line taut before eight o'clock (Tr., p. 3023). The Mikahala, from the

first, was intended to handle the Ship when she came off, as, without one vessel being where she could raise anchor quickly and get out and away easily in charge of the ship, there would have been grave danger to all vessels involved. Therefore the Mikahala laid her anchor comparatively close to herself, merely to hold her own position against the sea and tide (Tr., pp. 2896, 2661, 1863), and was rigged with the bridle arrangement to enable her to change direction immediately and pull sharply aside if necessary,—a thing a vessel pulling on a stern line cannot do and keep pulling (Tr., pp. 1766, 2157-8). By the bridle arrangement either line or rein may be slacked or cut, and the other being fast *amidships* allows the steamer to turn as on a pivot and steam at right angles almost instantly. It was well planned and served the identical purpose stated. (See Tr., p. 3061.)

Later on, the Likelike was brought out to assist the Helene, and for the same purposes as the Helene.

Lightering was begun promptly and proceeded rapidly, care being taken for the boats and men but at not too great a sacrifice for speed in the work. Some risk was run, and run voluntarily (Tr., pp. 3076-8, 3088, 2725-7, 2608-12). It was accepted as part of what salvage involves. It is an element which courts recognize as lending merit to the service rendered.

In the hope that the Ship might come off on Tuesday night with the rising tide, the steamers were directed by red lanterns in the rigging of the Ship when to go at full

speed and put forth their best efforts. The effort failed that night, but the lightering continued with practically no cessation, night as well as day, in anticipation of the next tide, which was at 12:20 Wednesday noon, but the Arcona came shortly before and broke her line and maneuvered the rest of the day, and prevented the attempt to float her at that tide. It was confidently expected by practically everyone, however, that with the lightering done and to be done by midnight, together with the rising tide, the pulling on Wednesday night should be successful (Tr., pp. 2300, 2295-6), the *Likeline* having been added to the Inter-Island vessels with her propeller and anchors to increase the strain.

As was done the previous evening, on Wednesday night the second red lantern was placed in the rigging at the request of Capt. Macaulay, he understanding its import, at about half past ten or eleven o'clock Wednesday night (See Nelson, Tr., p. 2798; Haglund, Tr., p. 2925; Macaulay, Tr., p. 2294; Henry, Tr., pp. 220-24; Lowry, Tr., pp. 293-4; Brisco, Tr., p. 335; Piltz, Tr., p. 2737).

Capt. Miller and most of his witnesses have testified that the second red lantern was not put up until the Ship was already afloat. With his version of the "sandwich supper" as a test of credibility, we do not hesitate to rest on the testimony above cited to the contrary.

The steamers accordingly put forth their best efforts and so continued until the Ship began to show signs of getting more lively and shifting and rolling in her bed.

Capt. Haglund came on board the Ship at 11 o'clock, and, in his confidence that the Ship would come off that night, he took steps to make all clear. He stopped the lightering at the main hatch in order to let the donkey scow be cast off (Tr., p. 2156), and sent Capt. Piltz over to the Mikahala, thus ending the lightering (Tr., p. 1965), and stationed men with axes ready to cut the lines of the steamers (Tr., pp. 2918, 3038-41). Piltz, arriving on board the Mikahala, immediately hoisted the boats and stationed men there with axes to cut the Mikahala bridle line when he had to turn (Tr., p. 1780). The plan was that as soon as the Ship was afloat the line of the Likelike should be cut first, being farthest from the Mikahala, and then the Helene line and one of the lines of the Mikahala (leaving her bridle-rigged line until shortly afterwards), all of which was done exactly as planned (Tr., pp. 2916, 2320, 2774), and the second line of the Mikahala was cut after her side pull on the Ship had been accomplished (Tr., pp. 769-70, 1796; Henry, Tr., p. 192).

At about quarter of twelve, the Ship beginning to move seaward, the Mikahala executed the first step in her final duty by moving slightly more to eastward to get squarely in line between the Ship and her own anchor, to be in readiness to pick it up promptly (Tr., pp. 1983-4). Finding the Ship surely coming, Capt. Tullett hove on his anchor to take it up, and took in most of it until it got foul on the bottom and as he could not take it in he took a turn on his weather bitt and deliber-

ately broke it to be free quickly (Tr., p. 2672). By this time the Mikahala had gradually moved forward until her bow, at first just in line with the stern of the Arcona, forged ahead and past the Arcona. At this time, the Mikahala still edging eastward, the Ship began to come off very rapidly, acting obediently to the combined pulling of the Helene and Likelike on the one side and Mikahala (more across) on the other (see Tr., pp. 3154, 804-5, 802), and came clear of the reef and in a direct line for the Arcona which vessel lay still in her position throughout; and when it became apparent to Capt. Tullett that the Arcona wasn't moving or going to move and there seemed some danger of a collision from the Ship, he headed the Mikahala abruptly East, cutting the starboard rein of the bridle for the purpose, and steamed Eastward off at right angles to her former course, pulling from her port waist (Tr., pp. 1983-4), which means the Ship was swerved, and brought her to a standstill, when her line was cast off from the Ship. (See Dowsett, Tr., pp. 2099-2100, 2151-2, 2162; Macaulay, Tr., p. 2322; Tullett, Tr., pp. 2672, 2847; Haglund, Tr., p. 2919; Lewis, Tr., pp. 3231, 3252-3). The Arcona thereupon, having hastily picked up her anchor, put on full speed and fairly darted off with the Ship in tow. Then, instead of fulfilling the express understanding that the Arcona was "to take charge of the vessel and bring her to a safe anchorage (Macaulay, Tr., p. 2318), the Arcona let her go "in the open sea" (Macaulay, Tr., pp. 2323-4); and when Capt. Henry

had to fall back on Haglund again for aid to get the Ship to a safe place, Haglund very naturally was unprepared, and said his "boats were here, there and everywhere." But he agreed to take charge again when the Arcona was out of it (Tr., p. 2924), and the Likelike then took hold, and towed her back to a safe anchorage off the harbor (Tr., p. 2325). It is some small part of the service of the Inter-Island Company that the Ship was thus cared for after the Arcona let go. The Arcona let go out in the open sea, and not anywhere near where an anchor could be laid. It amounted practically to the Likelike towing a helpless vessel into port, as though disabled in some way. Under all the circumstances and in the dead of night, it was not "usual towage" as claimed by Capt. Henry (Tr., p. 142). As a matter of fact the Arcona took the Ship so far out that it took the Likelike from 2 to 3 o'clock to get back to the usual anchorage off the harbor (Henry, Tr., p. 147).

The Ship having been safely anchored, the Likelike and Helene stood by until morning, by way of greater precaution, should anything occur to make help necessary (Tr., pp. 2958, 3051-2). It may be argued that this last office was unnecessarily assumed and that the Ship was perfectly safe without it. That is probably true. But it was thought wise, and nothing is claimed in this case on account of it except the fair judgment of the Court as to whether or not the Ship's Captain felt any easier for it having been done, and except as it will characterize the thoroughness with which the Inter-Island work was put through.

In the morning the Inter-Island steamer "Maui" towed the Ship into harbor and to dock (Henry, Tr., p. 147). This was not salvage but towage, but as towage it has not been compensated for, and we ask that it be considered and allowed for accordingly.

On this appeal all parties have accepted the finding of the trial court that the value of the Ship was \$25,000, and that of the cargo (including freight money) \$109,559, making a total of \$134,559. (Tr., p. 3372.)

There is no reason to question the findings of the Court as to the values of the Inter-Island vessels (Tr., p. 3372), because they stand undisputed. Their ownership was admitted (Tr., p. 744). The length of time these vessels were engaged is also stated by the Court (Tr., p. 3372). The value of the Intrepid was admitted to be \$30,000. (Tr., p. 3221.) The complements of men on the Inter-Island vessels were also admitted,—154 men in all,—(Tr., pp. 3220-1). Besides these vessels the Inter-Island steamer Iwalani made a trip to the vessel on Monday morning (Tr., p. 746).

Nor is there any question that the extra expenses of the Inter-Island operations, exclusive of regular salaries and wages, were \$3,561.77, as found by the Court (Tr., p. 3372).

Another element which enters into the actual losses by the Inter-Island Company on account of the salvage operations is that which must admittedly result from the inability of the Mikahala to make her usual Molokai-Maui run (Tr., pp. 2958-9), in consequence of which

a "much smaller boat," the Ke Au Hou, was substituted. It needs no argument to have the Court recognize the fact that a much smaller boat could not handle the regular amount of freight nor carry the average number of passengers, and some loss necessarily resulted on that account.

THE ARCONA.

The principal contention of the Appellant in the court below has been that the Arcona was the principal if not the sole agency which effected the floating of the Ship. A large part of the testimony on the trial therefore bore on this issue, and the depositions of the officers of the Arcona, when opened, showed a clear admission that the Arcona was not using her propeller. The comment of the trial Judge that much of this testimony was profitless (Tr., p. 3358), is very true, but, in view of the pleadings, it could not well have been anticipated that the claimant's own proofs would show no use of the latent power of the cruiser. Nevertheless, the Court's remark seems to us particularly indicative of the real ineffectiveness of the cruiser as a salvor. But we have no assurance that appellant will not still maintain that great credit is due the Arcona. Not only this, but Counsel's arguments heretofore have been replete with references to the large tonnage and horse-power of the Arcona, and the large experience of her principal officers. Moreover, it has been claimed that the bare fact of the presence of this cruiser in the harbor of Honolulu

made the case very different from one of a vessel ashore far from any port of assistance, because the Arcona was available at all times and could have been had if necessary. Therefore, that the Ship's location was not really precarious and the salvage services were of little real merit. The Loch Garve case has been cited as one where the danger was greater because of the greater distance from a port of assistance.

We think that the mere difference in geographical location,—about sixty miles only, would matter little so far as vessels or aid other than that of the local agencies is concerned. It is true that Honolulu is more convenient, as respects aid from Honolulu or Honolulu harbor, but the principal difference that opposite counsel would urge upon the Court seems based on the fact of the mere physical presence of the German cruiser "Arcona" in the harbor of Honolulu at the time. We submit that the record shows a case equivalent to the utter absence of the Arcona, so far as that vessel was concerned as a "salving agency." Nearness to a port of safety means nearness to a port from which assistance can actually be had. Absence of all vessels from Honolulu and vicinity would make Diamond Head reef or Barber's Point almost as remote from salvage aid as a vessel on the French Frigate Shoals. Capt. Henry of the Celtic Chief, and opposite counsel in this case, are pleased to allude to the Arcona in terms descriptive of a "big powerful vessel" which could have been called upon and was there to help if the other agen-

cies failed. Because the Arcona has claimed and will claim no salvage it behooves counsel to belittle as far as possible the efforts of the other or real salving agencies.

In point of fact, the Arcona *was* called upon for assistance, on the evening of the first day the Ship was ashore, request having been preferred by the British Consul, and this request was next morning supplemented by that of the agent for the cargo, and yet this cruiser did not go out until noon of the *third* day.

It is submitted that no rule of law, or *theory* of law, ought to be applied in this case which would detract from the merit of the services actually rendered a vessel ashore by the only *real* salvors who did go out and give immediate assistance at the time when her position was most critical and her danger uncertain and possibly imminent, and who actually saved her from destruction, especially when, by the evidence of the most credible witnesses in the case, the *theoretical* power of the Arcona and supposed ability of her officers was shown, by their actual operations, to have been anything but potent, efficient or valuable. With all the factors pertaining to a vessel of her size and kind, that is to say her tonnage, horse-power and general equipment the cruiser *should* have been a valuable aid. Instead of that her operations were cumbrous and wholly unseamanlike; her advice to the Captain was more bad than good, and even after she towed the ship out into deep water she practically deserted her and left her in another position of danger.

Instead of being a help to the distressed vessel, the Arcona probably prevented the floating at an earlier time, because the cruiser appeared on the scene just before the high noon tide on Wednesday at which time there was at least a hope that the vessel would come off, and the steamers were pulling hard when she came, but had to suspend operations to make way for the Arcona to take position and run lines, and as she was all afternoon in doing it the pull was lost for that tide. The vessel might otherwise have been floated that afternoon. See Tr., pp. 2505-6, 2665-6, 2720 and 388.

We make the foregoing statements with reference to the Arcona because we submit they are abundantly established by the following evidence in the case.

In the first place, while it must be assumed that it was the intention of the Arcona's Commander to assist, when he finally did go out to the scene of the operations, we think it was to be only in his own way and in his own good time. We find, in the evidence, here a glimmer and there a glare, of something else that was manifestly of greater importance in their minds,—the safety of their own vessel. They were afraid that the cruiser would be injured in some way and they were caring for the cruiser *first*.

Beginning with the evidence of Mr. Watkins, we find (and elsewhere as well), that the Commander didn't *offer* his services; they were requested by the British consul (Tr., p. 3290), on Monday evening, December 6 (Conneman, Tr., p. 423).

Now an official request like that must be acceded to. But he did not hurry about it. He went out in a launch on Tuesday morning, Mr. Watkins accompanying him, and they talked. He "seemed very loath to say anything about it until he had seen the conditions," and on the way back, having *seen* the conditions, Mr. Watkins asked if he wasn't "perfectly willing to *go out right away*, and he said, *No*, he'd made up his mind that *he would not go right away but he'd wait* until the *next day* and then if the agencies at work had not pulled the ship off he would go out the next morning." (Tr., p. 3291.)

"Q. Did he say anything further about that?

"A. Well, he, as I say, he seemed to be, *he didn't relish the job; that's the impression he gave. He didn't relish the job of going out.*" (Tr., p. 3291.)

On Wednesday morning, still leaving the cruiser behind, he went out again, Mr. Watkins with him, and "he stated at that time that *he wanted the position that the Intrepid had* and told the Captain in my presence, Capt. Henry, that he wanted that position, *and unless that position was made clear for him that he would not take hold*" (Tr., p. 3292). Perhaps that condition, being an unusual and arbitrary one, he hoped it might serve to let him off.

Mr. Kennedy testified to the Commander having said he would pull after 1,000 tons of cargo had been removed (Tr., p. 822).

The Intrepid held the *best position* (Tr., p. 2504), and the cruiser must have the best. His aid would be available *only upon condition* that the Captain of the Ship "would get the Intrepid out of that" (Henry, Tr., pp. 122-3, 168-9). And, no doubt, Capt. Henry expected to get a big power on his ship if she went out there, so he met the condition.

The Commander would have liked more than that; he wanted Miller to make room for him too (Tr., pp. 1356, 1691-5, 1899, 1919).

Appellant's counsel have even argued, in effect, that the *Mikahala* should have vacated *her* particular part of the ocean had there been any question of the Arcona moving that way, by intent or otherwise.

The Arcona first went out at about eleven o'clock on Wednesday (Tr., pp. 1786, 2663, 2896, 3057). Proceeding, then, to "take her position," she steamed to a point *directly astern* of the stranded Ship, and there dropped her anchor (Nelson, Tr., pp. 2777-8; Tullett, Tr., pp. 2663-4; Libellant's Exhibit "H" showing Arcona anchor by a cross marked "I;" Macaulay, Tr., p. 2479, referring to Exhibit "H;" Haglund, Tr., pp. 2895-6); approximately between the locations then held by the Mikahala and Helene (Piltz, Tr., p. 1786), and about 1500 feet from the Ship (Haglund, Tr., p. 2896); making no allowance for tide, wind, or current, in consequence of which, as will be seen, she had to change her position.

But having thus first dropped her anchor she ran a manila or hemp line to the Ship, and whether it was

intended only as a messenger to send over a small wire or whether it was really used at first instead of a wire to heave the Arcona around into position, it broke (Nelson, Tr., p. 2777; Tullett, Tr., p. 2665; Brisco, Tr., p. 323; Haglund, Tr., pp. 2896-7). In any case she passed a small wire to the ship and made that fast and hove on it to bring the cruiser around into position, not intending to pull on the ship (Haglund, Tr., pp. 2896-7, 3058; Henry, Tr., p. 128; Piltz, Tr., p. 1847). Schroeder and Conneman called this a "test" (Conneman, Tr., p. 421; Schroeder, Tr., p. 387, 394). At that time the cruiser was lying practically at right angles, broadside to the stern of the Ship (Haglund, Tr., p. 2896); heading about East (Tullett, Tr., p. 2665); "laying cross-wise" (Mason, Tr., p. 945).

Whether in heaving on this wire (which was her own, Tr., p. 2334), to get into position in line fore and aft with the Celtic Chief, she used only her capstan at first, and then her propellers (Tr., p. 2896), it is clear that no sooner had she started her engines than the wire broke (Haglund, Tr., p. 2897). Some witnesses say she pulled just about a minute (Weisbarth, Tr., p. 636; Piltz, Tr., p. 2047). "Steamed ahead" (say 6 or 7 revolutions, Tullett, Tr., p. 2664); and "steamed on it" (Weisbarth, Tr., p. 604). "Pulled on it and the line parted" (Ib. 607). "Directly after she started ahead" (Macaulay, Tr., p. 2309).

The time of breaking of this wire was between twelve and one o'clock (Tr., pp. 1806, 2664, 2720, 2933, 3057), and about high tide (Tr., pp. 2664, 2720, 2933, 2331).

Meanwhile the Arcona had been swinging from her anchor, by force of the tide, wind, sea, and current, until she had moved down too close to the Helene ('Tullett, Tr., p. 2663; Piltz, Tr., pp. 1786, 1826-30; Macaulay, Tr., p. 2302), endangering that vessel as well as herself, and consequently imperiling the Ship (if the Helene had been interfered with); too close to heave clear of the Helene and get into position (Haglund, Tr., p. 2898). She therefore hove up her anchor (Tr., pp. 2663-4, 2778, 2304), and steamed eastward and seaward, toward Diamond Head, this time further eastward than necessary or consistent with safety because she went ahead of the Mikahala (Nelson, Tr., p. 2778; Piltz, Tr., pp. 1786, 1829; Macaulay, Tr., p. 2305), and dropped her port anchor there, about a point to port of the Mikahala's bow (Piltz, Tr., pp. 1787, 1790). When she dropped it her stern was directly ahead of the Mikahala's bow (Piltz, Tr., pp. 1788, 1929). One witness merely said she "went to anchor" (Mason, Tr., p. 934).

If a straight line were drawn from the stern of the Celtic Chief out to and continuing seaward through the Mikahala, the point where the Arcona's anchor was thus dropped the second time would be practically on that line but a little to the east of it if anything (Haglund, Tr., pp. 2898-9; Macaulay, Tr., pp. 2305, 2306-7, 2477-81),—the east or Diamond Head side of it (Piltz, tr., pp. 1787-90).

From where Capt. Haglund stood at about the middle of the Ship astern, this line extended out, not

through, but past, and just clearing the Mikahala's starboard bow (Tr., p. 2899). He saw the anchor dropped in that position (Tr., p. 2899), the Mikahala not being *in* the line or obscuring his vision. Counsel endeavored to confuse Capt. Macaulay by trying to make him explain how he could see the anchor dropped unless he looked through the superstructure on the Mikahala. It developed that when Capt. Macaulay said he saw the anchor dropped he did not necessarily mean he saw it as it entered the water, but he is positive he saw the splash made by the dropping of the anchor (Tr., pp. 2306, 2578), and saw it over the bow of the Mikahala (Tr., pp. 2478-87, 2582-92).

Captain Macaulay also drew a sketch of the positions of the vessels, as they lay on Wednesday night (Tr., p. 2228), admitted in evidence as Libellant's Exhibit G (Tr., p. 2301), on which Position "A" indicates the position where the Arcona's anchor was first dropped (Tr., pp. 2302, 2479-80), and on which sketch the witness also drew the second position of this anchor, marked as Position "B" (Tr., pp. 2305, 2480).

The evidence is not exact as to the distance ahead of the Mikahala to the point where the Arcona anchor was dropped the second time. Captain Haglund was sure of the line in which it lay from the Ship, but not of the distance ahead of the Mikahala because he could not very well judge from his position which was at one end of the line itself (Tr., pp. 2898-9). Capt. Macaulay, for the same reason, didn't care to state the distance, but on an answer being pressed said he thought

it would be less than five hundred feet, and must have been three or four hundred feet (Tr., p. 2308), and again he later said 500 or 600, might have been 400 (Tr., pp. 2482-3). And see (Tr., pp. 2577-9, and 2582-92). Capt. Piltz said first about 300 or 400 feet (Tr., p. 1787), and then 200 to 300 feet (Tr., p. 1788, and see Tr., p. 1969).

See also Capt. Tullett's sketch admitted in evidence as Libellant's Exhibit H (Tr., p. 1953), where the second position of the Arcona's anchor is shown as figure 2 (Tr., pp. 1952, 1955).

Capt. Henry didn't know where the Arcona anchor was (Tr., p. 179). And there is not any evidence contrary to that of the witnesses indicated above. She did not take up her anchor again that evening (Macaulay, Tr., p. 2305).

As to placing of anchors, the officers of the Arcona leave the point indefinite. Conneman makes no reference to anchoring more than once. He said, "The Arcona *anchored* near the Celtic Chief and took a position for towing" (Tr., pp. 419-20); then "an anchor was laid" (Tr., p. 420); and the anchor chain "ran to the *right* forward" (Tr., p. 428). Capt. Schroeder says, as to laying the anchor, "for this purpose I once changed my berth" (Tr., p. 382). And he said he did not remember "whether this anchor was laid out at 12 o'clock or when I had to change my position" (Tr., p. 386).

May we here note the conclusion of the trial judge (Tr., p. 3360), that he did not think the Arcona anchor

was as far over as Piltz, and the other witnesses said, even though they were regarded by the court as "four credible witnesses." Not only is there *no evidence to the contrary*, but Schroeder himself said that his anchor was out on about 100 meters of chain (328 feet), the direction being "two points (23°) to the left of the bow of the Arcona" (Tr., p. 392). And although the *stem* of the Arcona was about opposite the stem of the Ship her *bow* was inclined toward the East (Tr., pp. 1981, 1987), her stem being about abreast of the bow of the Mikahala (Tr., pp. 1967, 1788, 1834), and was only about 150 or 200 feet from the Mikahala (Tr., pp. 762, 1788, 1984). And see Libellee's Exhibit 6 and Tr., pp. 2136-7, 2138-40, 2089-90, and also Macaulay's sketch, Libellant's Exhibits G and H, and Tr., pp. 2313, 2659-61. The Mikahala herself was only three points off the Ship's stern (Tr., p. 2222), and 500 feet from the Ship (Tr., pp. 2222, 2902, 2709). Any approximate scale sketch will show that the Arcona anchor *was* away over ahead of the Mikahala.

Having dropped her anchor the second time, the Arcona paid out chain (Tr., p. 2899), and swung to westward towards the Helene (Piltz, Tr., p. 1789; Tullett, Tr., pp. 2664-5), until she got about half way between the Helene and Mikahala looking from the Celtic Chief (Haglund, Tr., p. 2899), but seaward of them a little. She then ran a second wire, and another, and maneuvered with them until she was ready to "test," whereupon she started up her engine, steamed

ahead, and broke one wire,—the wire borrowed from the Ship. This second breaking occurred somewhere around three o'clock.

By the evidence these lines were entirely too small for towing purposes (Haglund, Tr., p. 3058), and which we think her commander well knew because he was careful to apply his engine power very cautiously to test them with the result that they broke after a few revolutions. Realizing their weakness he did not again attempt to tow with them. Her executive officer said as much to Capt. Haglund (Tr., pp. 2912-13). Macaulay said he "hove an ordinary strain" on it and "let it go at that for the time being" (Tr., p. 2309). After about 20 minutes or half an hour she tightened up on the wires and by two o'clock she was *ready* to pull (Henry, Tr., pp. 186-7), and after about 20 minutes or half an hour after that she tightened up on the wires (Henry, Tr., p. 188). The first "pull" then began, between two and three o'clock (really about 2:30,—see Nelson, Tr., pp. 2778, 2820; Brisco, Tr., p. 324; Henry, Tr., p. 187). Henry says when she put a *strain* on that line it carried away (Henry, Tr., pp. 128-9), meaning the Ship's own line (Henry, Tr., p. 188). The cruiser thus broke the Ship's wire by steaming ahead with her propeller, and the breaking was practically immediate. "Just a few turns with her engine" (Piltz, Tr., p. 1805); "went ahead * * * with their engine and parted those wires or one of them" (Nelson, Tr., p. 2778), and she had been using her propellers "not more than five minutes * * * might have been less, might

have been a minute" (Nelson, Tr., p. 2818). "She pulled on it and the line parted" (Weisbarth, Tr., p. 607). Lowry says "she went ahead and broke it" (Lowry, Tr., p. 272). He thought it broke at about half past three (Tr., p. 272).

Capt. Henry was very evasive when asked how long the cruiser had been pulling before she broke that wire. He gave the time as two o'clock when she was ready for the first attempt (Tr., p. 187), and it was about twenty minutes or half an hour after that that he saw them tighten up (Tr., p. 188), and that the breaking occurred "between 2 and 3 o'clock" (Tr., p. 187), but he would only say, in answer to the question "how long had she been pulling" prior to the break? "I cannot say;" "no, not a great length of time;" and "I don't know whether she had been pulling any length of time or not" (Henry, Tr., p. 188).

It appears that although the Arcona started her propeller that afternoon, it was only a "test," as, in answering direct interrogatory No. 26, Capt. Schroeder said, "There was one test made during the first attempt in pulling the Celtic Chief off. The test was made by heaving in the anchor chain until the line was taut and then moving the ship's engines with increasing speed. The result was the line snapped at revolutions for eight knots speed" (Tr., p. 387). They didn't try it again. This falls easily into harmony with the idea that the line was too small in the first place for pulling with the propeller, and they knew it, but ventured a test. This

view is supported further by the opinions of competent witnesses:

Mr. Kennedy felt satisfied that the Commander of the Arcona would not be foolish enough to put on full speed ahead in testing a wire. "No careful person" would. He assumed, therefore (as was the fact), that the test was made with slow speed at first. From the further fact, known to him (see his phrase "They turned her engine and busted it," page 776), that this was hardly begun before the line broke, he deduced the conclusion that the line so broken was not a strong one (Tr., pp. 777-780). Mr. Kennedy showed a fair opinion of the judgment he at first thought the Commander had,—because he assumed he would be a "careful person." Captain Haglund said "That was no size wire for her to pull on" (Tr., p. 3058).

Whether or not heaving *only* was intended in the first place, and not propeller pulling, there was *no question about it after* that "test."

The next move of the Arcona was an attempt to get a large wire on board. Capt. Macaulay said "the executive officer told us that they had a very powerful wire, very heavy and powerful wire, and they would try to get that on board. * * * That was Wednesday afternoon * * * after she broke her first wire. * * * They bent this messenger (previously mentioned by Capt. Macaulay, Tr., p. 2312), on to this heavy wire and they hove it as taut as ever they could. They couldn't get it no more and the messenger parted, so

they hove it a second time and bent on to this heavy wire and I believe it parted a second time. I don't know exactly how many times it did part * * * I was on the poop of the Celtic Chief, but, however, they gave it up and said they couldn't get it on. Q. Do you know why they couldn't get it on? What prevented? A. The messenger line parted two or three times. Too heavy. That heavy wire, I suppose, digging into the sand and so heavy that the messenger wasn't strong enough. However, they gave it up" (Macaulay, Tr., p. 2313).

This is borne out fully by the following additional testimony:

Capt. Piltz said of it that they spent several hours trying to get this big hawser aboard, and they failed,—gave it up,—and took it aboard the Arcona again (Tr., pp. 1805-6); adding also that in his judgment the weight of the wire and the way they went about it, letting its end catch on the bottom, made them give it up (Tr., p. 1806).

Mr. Dowsett said "they had no success at all," although they made two or three attempts while he was there (Tr., p. 2088).

Capt. Tullett says she spent quite a long time on it, about three hours. "She made three attempts and each time it got foul of the bottom and they would break the line that they were heaving on board the ship and they finally gave it up and went out on the Arcona again" (Tr., p. 2665).

When they left off this attempt it was between three and four o'clock in the afternoon (Tullett, Tr., p. 2665).

Captain Haglund said of this big hawser work that it fouled on the bottom, and what he saw was that "she tried to heave it aboard with a surf line *without anything to keep the wire from sinking; no buoy, no boat, or anything*, consequently she sunk to the bottom and dragged herself down" (Tr., pp. 2899-2900). They took two or three hours at it anyway (Tr., p. 2900). Capt. Haglund then proceeded further to tell how they should have gone at it. Under the circumstances, the Arcona having a steam launch which was used to carry over the surf or messenger lines, they should in his judgment have run the surf line and then put the end of the wire on the launch and put it on the Celtic Chief, and it could have been done within five minutes (Tr., p. 2900). It is clear that *anything* which would have floated the end and kept that from sinking down and catching on the bottom would have met the difficulty.

Note the *admission* indicated by Conneman's answer to direct interrogatory No. 24 (Tr., p. 420), when asked how the Arcona was connected with the Celtic Chief: "During the afternoon * * * by one steel cable, and in the *evening* by two steel cables." He forgot the "big hawser."

After they gave up the attempt to run over the big hawser, the Arcona officers then ran another small one, and then another, one of these being the Ship's broken

wire which was spliced in the middle (Henry, Tr., p. 189; Haglund, Tr., p. 2901). It was even then too short and was pieced again with a piece of wire from the Arcona (Henry, Tr., pp. 189, 195, 197; Macaulay, Tr., p. 2509), which piece was 75 meters long (Henry, Tr., p. 383), and which piece Haglund says he saw at the place it was fast to the quarter bitts on the Arcona when he went aboard her Wednesday evening, and that it was *smaller* than the *Ship's* wire (Tr., pp. 3030, 2226).

May we here refer to the record as to the sample of wire which Captain Henry produced during his testimony, then marked Claimant's Exhibit, Henry B (Tr., p. 3026), and later, on the trial, received and marked as Libellee's Exhibit 7 for identification (Tr., p. 3027), which was exhibited to Capt. Haglund, and of which Haglund said that neither of the lines the Arcona had to the Ship was as large as that (Tr., p. 3028), but of which he said further that it may have been a part of the wire of the *Celtic Chief* (Tr., pp. 3029, 3192). The witness sought to show that while the sample produced may have been part of the Ship's wire, nevertheless it was not a sample of *the wire*—i. e.—the size, and therefore strength, of either of the wire *lines* used in pulling by the Arcona, *because* the Celtic Chief's wire had broken, was spliced, and was too short, and was *pieced* at the Arcona end by a *smaller* wire furnished by the Arcona, and no part of the *Celtic Chief's* wire came on board the Arcona (Tr., p. 3032). Note his reference to the "*whole wire*" (Tr., p. 3032). Also

counsel's admission that it was not a sample of the "whole line" (Tr., p. 3196).

But counsel fought strongly against questions put on redirect examination to bring out these facts, and offered many forms of "admissions" to prevent further questions (Tr., pp. 3192-99), and finally was forced to admit the fact itself that the lines not supplied by the Celtic Chief—i. e.—those furnished by the Arcona,—were "*an inch* in diameter only" (Tr., p. 3199). Haglund had already testified that the Arcona lines were "one-inch diameter, three inch circumference" (Tr., pp. 2901, 3198). The "sample,"—of the Ship's wire, was *larger*, being an inch and a quarter diameter or four inches circumference (Tr., p. 3027), as against the one inch (or three inch circumference) of the parts on the Arcona end. And be it remembered that the Celtic Chief's larger wire had already broken, and the smaller piece later put on was, still further, the weakest part.

The testimony shows, we think, that the two lines were not "made fast" until some time between six and seven o'clock that evening. As the point is important as indicating the degree of seamanship on the part of the cruiser, we cite the following testimony giving times varying from five to half past seven.

Captain Henry said the two lines were "made fast" by five p. m. (Tr., p. 130), and were "getting an equal strain on them by six (Tr., pp. 131, 186), and at eight o'clock were quite tight" (Tr., p. 190). In another

place he said that the time between 6 and 8 o'clock was used "to get an equal strain on them" (Tr., p. 190).

Piltz was sure the lines were not fast by five o'clock because at that hour he left the Ship for the Mikahala (Tr., p. 2048), and they were just about fast when he returned at about 7:30 (Tr., p. 2049). He says they were fast at about 7 or 7:30 (Tr., p. 2048).

Tullett said between six and seven (Tr., p. 2666).

Nelson said about seven o'clock (Tr., p. 2779).

Haglund said between six and seven—nearer seven (Tr., p. 2901).

In this process of getting an equal strain, which Capt. Henry says was then done, the Arcona's wires "were in the water now and again, and then they would be tight, and then they would slacken up again" (Henry, Tr., p. 244).

Captain Tullett said the wires were fast "between six and seven" (Tr., p. 2666).

Capt. Nelson said "about seven o'clock" (Tr., p. 2779).

Capt. Haglund said "between six and seven * * * nearer seven" (Tr., p. 2901).

They then proceeded to "equalize" or "get an equal strain" on the two lines (Macaulay, Tr., p. 2509). Capt. Henry said this covered the time between six and eight o'clock,—“by eight o'clock” (Tr., p. 190),—but we submit that the equalizing process of the lines, between six and eight, bringing them alternately in and out of the water, and making them tight and slack

(Tr., p. 244), was not finished by eight, because Mr. Kennedy said that he did not leave his *house* that night until about half past eight (Tr., p. 760), and reached the Mikahala at 9 or 9:15, and that *then* he noticed "the cable of the Arcona" (and only one was visible to him at all that evening, (Tr., pp. 784-5), was "playing up and down in the water" (Tr., p. 761).

The Arcona's possible power was in any case practically limited to the strength of but one of the two wires which ran to the Ship for the reason that the wires were run more or less parallel separated by the width of the Ship at one end and of the cruiser at the other end and the ends made *fast* both on the Ship and the cruiser (See Tr., p. 3031).

It follows that the least variation in direction of the Arcona would slacken the "off" line and bring all the strain on the "near" line or vice versa. Also in view of the way the lines were thus made fast on both ends we do not see how the cruiser conducted her "equalizing of the strain" except slightly by changing her own point of direction—possibly by working on her anchor chain. Certainly, with her anchor where it was, *had she heaved* and consequently swung more toward her anchor, the inner line (starboard on the Ship), would have slackened and any strain would have been only on the other line. But this, they say, didn't happen; they "kept them equalized;" and the Arcona *didn't* move over.

Capt. Schroeder (Tr., p. 394), and Lieut. Conne-man (Tr., p. 429), each in answer to I. I. cross 29,

say in effect that the position of the Arcona, when her lines were finally adjusted was about in line with the line of the Ship. This evidence is, in our judgment, rather overwhelmed by that of the other witnesses, heretofore referred to, that the Arcona lay with her stern about opposite the Ship's center line astern, but her bow was inclined at an angle somewhat to the eastward,—toward Diamond Head. See also the sketches on file.

After the two lines were fast, and apart from the "adjusting," it is the testimony of many witnesses that the Arcona did *nothing at all* involving her lines or any motion or use of her lines and did not move herself or her propeller or use her winches to heave; that she simply lay there inert and inactive in all respects except for using a searchlight later in the evening; and that this condition of affairs on her part continued absolutely without interruption until after the Celtic Chief was fully afloat and about to collide with her, when she first moved,—first to get out of the way and then to tow the unfortunate vessel far out to sea and cast her off.

As this inaction of the Arcona forms a very important part of the case before the Court, we trust we will be pardoned for making very full references and quotations from all of the evidence, both pro and con.

It has been argued that the strain by the Arcona was so great that it "crushed the strongbacks." (Citing Lowry, Tr., p. 274.) It is sufficient to reply that there is no showing that it was not the afternoon strain that crushed them, which strain was never renewed. See,

also, the comment of the trial court on this point (Tr., pp. 3359-60).

The testimony indicating pulling by the Arcona is naturally found in that given by the officers of the Celtic Chief and of the Arcona, who are, on their side, interested in giving the Arcona all possible credit in the operations in order that the amount of salvage to be paid will be as small as possible,—we say small because however much or little part the Arcona may have had in the actual salving, any portion of the award credited to her will be cancelled because that vessel will receive no salvage.

Capt. Henry:

From eight o'clock on, he said he "could see the lines *standing right out of the water.*" Like a "*line straight across.*" * * * There may have been an occasional dip, I would not say as to that, but any time I noticed there was always a steady strain on them and the lines *straight out of the water.*" (Tr., pp. 190-191.)

Just prior to going down to the sandwich supper, "They were *right straight out of the water.*" (Tr., p. 212.)

When the fireworks went off "They were *tight, right out of the water* at that time * * * Yes, *straight out of the water.*" (Tr., p. 140.)

Lowry:

"They were straight out; tight all the time" (Tr., p. 274).

(Note: *But*, Lowry went to bed at 10 and came out at 11:30 and went forward immediately and didn't know anything about them. So his testimony can relate only to the time *before* 10 o'clock.)

Brisco:

Said they got a steady strain by six o'clock, and then they looked tight,—“*Yes, straight out*” * * * “They were stretched out, *straight out*” (Tr., p. 326).

“The last I saw of them they were like that; it started to get dark and there was still a good strain on them.” (Tr., p. 326.)

“From twelve o'clock until she came off he said he observed them and “They had a good strain on them,” constantly. (Tr., p. 327.)

A general reading of the testimony of Capt Schroeder and Lieut. Conneman, as to the condition of the Arcona lines to the Ship, as to their being “taut or otherwise,” would indicate a positive personal knowledge on the part of each of them that the lines were constantly taut.

We think, however, that careful note will show that these assertions were based largely if not altogether upon *conclusions*,—testified to with positiveness because they assumed they *must be so* because *ordered so*. Capt. Nelson was not allowed to testify in this case that he *knew* the Helene put on full speed when he rang the engine bell for such speed, following which he received the telegraph signal back from the engine room, because it would be *hearsay*,—the argument made having been that he could only know the fact that full speed was put on immediately by the engineer *telling him so by use of the telegraph*. “How do we know,” counsel argued, that full speed was put on merely because Capt. Nelson gave the order for it and was told

by the engineer that the order was obeyed? (Tr., p. 2799.)

Let us review the testimony of the Arcona officers:

Capt. Schroeder said:

Direct 10: "I *ordered* the anchor chain of the Arcona to be heaved short. I do not remember what length, but until the hawser was taut (Tr., p. 382). "Then I *ordered* both hawsers to be made taut by heaving in the chain. * * * Then I *ordered* the hawsers *to be kept* taut all the time by heaving in the chain *as soon as the hawsers would slacken*. * * * I had hauled in about 25 meters of the chain from the time when the hawsers had been hauled taut" (Tr., p. 383). (Also see Tr., p. 398.)

Direct 30: "I know only that the hawsers were kept taut the whole time by that heaving in" (Tr., p. 387).

Direct 31: "They were kept taut" (Tr., p. 388).

Direct 36a: "During the three hours immediately preceding the floating of the Celtic Chief the steel hawsers which connected the Arcona with the Celtic Chief were kept taut by means of heaving on the ship's anchor" (Tr., p. 388).

Now, see cross interrogatory 41: "Referring to your answer to direct interrogatory No. 36a, *state whether or not any part of the same relates to matters not done or observed by you in person*, but is based upon reports made to you by your junior officers, or others, indicating what part or parts are stated upon such information? (Tr., pp. 375-6.)

And the answer: "Most parts of my statements are based on my own observations *but of course I have not stood near the hawsers for three hours*, especially not at about 11 o'clock when I went on board the Celtic Chief. The observations that

were not made by me *were reported to me* by my first Lieutenant who made them personally." (Tr., p. 396.)

Here we have, in the first place, admitted hearsay affecting the time covered by the last three hours. In the second place another erroneous statement of fact,—that his lieutenant who reported to him what he did not himself observe, made the observations *personally*. We shall presently show that they were hearsay, at least after *eleven o'clock*, even as to the Lieutenant himself.

What, we ask, did Capt. Schroeder really *know personally* about *that anchor chain being heaved upon* "as soon as the hawsers would slacken," during the last three hours? He did not point out any time whatever that *he* observed the anchor chain being heaved upon, and his whole testimony is therefore clouded with the uncertainty that necessarily affects most of it. Only in one place does he definitely say that he personally *saw* the hawsers "quite taut," namely at eleven o'clock just before he left for the Ship, at which time he again "*ordered them to be kept so*," and then after he was on the Ship (See Miller cross, Tr., pp. 398-9), but he has not said they were thereafter kept taut from any observation of his own.

Lieutenant Conneman also assumed to testify positively and apparently of his own knowledge, regarding the heaving of the anchor chain and the tautness of the lines.

Direct 30: "A continuous strain was exerted on both (lines) by heaving in the anchor chain of the Arcona." (Tr., p. 421.)

Direct 31: "Yes, the lines were kept taut continuously." (Tr., p. 422.)

Direct 36a: "By heaving in the anchor chain the Arcona's steel lines were kept taut continuously during the three hours immediately preceding the floating of the Celtic Chief." (Tr., p. 422.)

I. I. S. N. cross 6 (part 6 of answer): "I have *personally taken care* that the lines were kept good and taut during December 8, 1909, from 6:30 in the afternoon *to eleven* o'clock at night." (Tr., p. 425.)

I. I. S. N. cross 6 (part 7 of answer): "I have *personally watched* the various lines from board the Celtic Chief * * * from about 11 o'clock at night on. I have *seen* that the Arcona's lines * * * taut." (Tr., p. 425.)

Now, *how* did Lieut. Conneman "take care" and "watch" and "see?" We submit that these terms were used in the sense of his having been in charge and given the necessary orders and in that way "seen *to* it" that the heaving was supposedly done and the lines thereby supposedly kept taut,—because so *ordered*. We need go but one step further to show this: Part 8 of his answer to I. I. S. N. cross 6 (Tr., p. 425), was stricken because his statements as to the line being taut were manifestly hearsay. That answer, inadmissible as testimony, is still available for reference on the point of credibility as respects the rest of his evidence on the same point. In that answer it clearly appears that even when he used the word "*I know personally*," he had no fair understanding of what personal observation meant.

This appears by his answer that he knew personally “as (i. e.—“because”) I have *communicated the respective orders* of the Commander of the Arcona by means of a megaphone *from on board the Celtic Chief* to the Arcona *and I have received a reply* on every such occasion *that the order had been complied with.*”

As Lieut. Conneman was on board the Ship after 11 o'clock, he could not have made any *personal observations* to report to Capt. Schroeder, as stated by the Captain in answer to I. I. S. N. cross 411 (Tr., p. 396).

Again: Did Lieut. Conneman visually “watch” or “see” the Arcona lines, of whose tautness he has testified? He testified as above, to *watching* and *seeing* for the whole three hours. But we have another example of how he *saw* them taut: In answering Miller cross 6, which related particularly to the time before the first signal was given, he said: “The lines were kept taut continually. *About the position of the lines I cannot testify on account of the then existing darkness.*”

When Mr. Kennedy got up from his nap Wednesday night at about eleven o'clock “they were very quiet on the Arcona;” * * * “There didn’t seem to be any stirring at all * * * There was mighty few lights: * * * I saw one or two men parading back and forth on the ship. It was,—so far as appearance goes, from the position I had, it was evidently lifeless” (Kennedy, Tr., pp. 765-6).

Mr. Dowsett, prior to his taking his nap (at about 9:30) watched the Arcona’s operations. During that

time he "couldn't notice anything because there was nothing doing, there was a deathlike stillness on board there" * * * "We could see her quartermaster on the after part of the deck. I did see him once, as I remember." There were lights aboard. (Tr., pp. 2091-2.)

The following further testimony indicates the inactivity mentioned:

Capt. Haglund: After the two wires of the *Arcona* were both connected, somewhere between 6 and 7 o'clock that evening, "Nothing more" was done. "Just put on wires, the strain on them alike" * * * "They were equalized as near as I could judge; they were both the same tautness, I think." Their position then was: "Oh, a big bight in the water. They struck the water at about a distance, I should think, forty or fifty feet from the different ships," with no noticeable difference at either end that he could remember (Tr., p. 2902).

And from this time (6 to 7 that evening), he said again, when asked if there was any change in the position of the lines after that, he answered "No, not up the time that the ship was floated off, there was no visible change to me" (Tr., p. 2908). "Q. How often did you observe them?" "A. Well, shortly before eleven o'clock I was in the boat and around *the Arcona*; saw her chain and saw her lines, and after I got aboard the ship, somewhere around eleven o'clock, then the searchlight was on, which made everything pretty plain; you could see from the *Celtic Chief* whether there was any change or not. I couldn't see none" (Tr., p. 2908). He passed within 20 or 30 feet from her stern in the boat (Tr., p. 2909). He said he "certainly would" have known it had the *Arcona* lines or either of them been made taut that night (Tr., p. 2909). He said further: "I could see them (after dark and before the searchlight came on) *because*

I was out in the boat and close by them. I could see them from the Arcona when I was aboard of her, and I could see the Celtic Chief end when I was aboard the Celtic Chief" (Tr., p. 2910).

Between a quarter of 12 and 20 minutes past twelve "They were slack, the same as they *were*; both slack in the water, probably about fifty feet from either end where they were fast. * * * I saw both of them. The searchlight was on them and lights of the Arcona, all kinds of light on her, and you could see the two ends perfectly well" (Tr., p. 2922).

(Note: Haglund *could* see both lines, being on the Ship, but those on the Mikahala could see only one line, on their side.)

Capt. Macaulay: "While I remained on the poop there, the whole afternoon and evening, taking in the situation as it was exactly, and I observed the Arcona's lines just the same as any other vessel that was pulling, came to the rescue of the ship. Just the same as I did the Inter-Island boats and the same as I did the Miller Salvage Company's gear" (Tr., p. 2314). And he observed the lines constantly (Tr., pp. 2293, 2299-2301).

"Q. Now describe the position of the Arcona's lines that evening with respect to the water?

"A. Well they were, the *Arcona was not pulling on them at all*. They were fast, the lines were fast to the Celtic Chief and also to the Arcona, and I suppose when the executive officer went on board and communicated with the commander, that they did all they could for the time being to assist the ship. *Ordinary strain* on the chain cable and also an ordinary strain on the wire. Nothing excessive.

"Q. Were her lines *in or out* of the water?

"A. *The bight of her lines were in the water*" (Tr., p. 2315).

"Q. Now, after they had gotten the Arcona into position and as she lay there at low water, *did*

she after that put any strain on her lines to pull on the Celtic Chief?

"A. Previous to her floating?

"Q. Yes, previous to her floating.

"A. *No, she did not.*

"Q. How do you know that?

"A. *Because I saw the line.*

"Q. How were her lines?

"A. *In the same condition as they were before*" (Tr., p. 2316). * * * *I said before that the bight of the wires were in the water*" (Tr., p. 2316).

"Q. Now did you notice the Arcona's lines during the time the Celtic Chief *was first beginning her seaward movement?* A. I did.

"Q. How were they *then?*

"A. *In the same condition, only slacking up as the Celtic Chief came astern.*

"Q. They were slacking up? A. They were slacking up as the Ship went astern, and the Arcona's wires slacked up.

"Q. And *during the remainder of the time the ship was coming off, how were they then?*

"A. *They continued to slack up*" (Tr., p. 2317).

"How were the lines of the Arcona at the time when the Celtic was, within say, a hundred feet of her?

"A. *They were MORE SLACK*" (Tr., p. 2322). "The two lines were very slack, laying down to a bight at that time" (Tr., p. 2322).

"*Afterwards she towed the Celtic Chief, yes*" (Tr., p. 2322).

"Q. Now, during that evening, during pulling operations, *could the Arcona have gotten a strain on her lines and you not have known it?*

"A. *She could not*" (Tr., p. 2325).

"*I noticed every movement of the Arcona from the time she came out until the time she returned to Honolulu Harbor; after she let go the Celtic*

Chief she went right into the harbor for the night” (Tr., p. 2328).

On cross-examination Capt. Macaulay, describing the process of equalizing the strain of the Arcona lines in the early evening, told how after again piecing one of the lines “they made that fast and got an equal strain” (Tr., p. 2509). Then questioned further as to the position of the lines, we quote as follows:

“Q. Were the two lines hanging clear of the water?

“A. They were forming a slight arch from the stern of the Arcona to the stern of the Celtic Chief.

“Q. A slight arch? A. Yes, a slight curve.

“Q. Do you mean they formed a bight in the middle which would touch the water? A. Oh, yes, it touched the water. * * * Not so very much. * * * *In the middle, in the center.* * * * They maintained the same position. * * * During the rest of the evening.” During the last half hour “just the same” (Tr., pp. 2510-11).

As to the time after daylight he said “At times I could observe them by means of the Arcona’s searchlight, then I could observe them *a certain distance* from the taffrail of the Celtic Chief, but I couldn’t see the lines directly close up to the Arcona.

“Q. But you could see them from the Celtic Chief *down to where they touched the water*, from the Celtic Chief?

“A. *Pretty close.*

“Q. About half the distance, the point where they would touch the water? A. In the center?

“Q. Yes, in the middle of the line.

“A. *About the middle of the line*” (Tr., p. 2511).

In his judgment the testimony of other witnesses that during the last half hour “those lines were

hanging *absolutely slack down* in the water, the lines hung down from the stern of the Arcona into the water and hung down from the stern of the Celtic Chief into the water,"—"would be incorrect" (Tr., pp. 2511-12).

Because they were "*not quite as slack * * ** *Not anywhere near as slack*" as that (Tr., p. 1833).

He even assented to the question: "Because they were hanging as you have already described them, with a bight in the middle, *slightly touching* the water?" (Tr., p. 2512.)

To this last phrase "slightly touching," adroitly inserted in the question last above mentioned, we wish to say, first, that the witness had said only that there was a "slight curve," and "oh yes, it *touched* the water" (Tr., p. 2510); and he had not said "slightly touching." We think also that when he was asked the question above: "But could you see them from the Celtic Chief down to where they touched the water," and answered "Pretty close,"—he meant they *touched pretty close* to the Ship, as he went right on to say "about the middle of the line" (Tr., p. 2511). This will be shown, we think, by the testimony given later on the same point and with respect to the same time, as follows:

"Q. During the half hour before the Celtic Chief moved off were the lines of the Arcona sagging in the water?

"A. What do you mean by sagging in the water?

"Q. Were they not merged, submerged in the water, at least part? A. Yes, *towards the center* they were.

"Q. *About how much of the center* if you can give a proportion?

"A. From the Celtic Chief rail or deck *would be fifty feet of wire out of the water and the same would come from the Arcona's rail to the water, that would make a hundred feet out of the water. The balance would be, naturally, in the water. * * * That was the condition of the line*" (Tr., pp. 2639-40).

And on recross-examination Capt. Macaulay said *that was what he meant when he testified "that the middle of the line was under the water"* (Tr., p. 2654).

See again, his testimony on page 2539, where he said *he knew the Arcona wasn't pulling and had no strain. He was positive of it.*

While, therefore, taken as a whole, Captain Macaulay's testimony is not as strong as that of the other witnesses as to the *absolutely slack* condition of the Arcona lines, he is absolutely firm on the point that *she did not pull, and had no strain, and never moved, until the Ship was afloat.* In this, his testimony on other points than the simple condition of the lines (which is all for which the citations have thus far been made), will make the conclusion complete.

Captain Tullett:

The Arcona having gotten those two lines fast, between six and seven o'clock, "didn't do anything after that" (Tr., p. 2666).

One of her lines ran over the Mikahala lines (which came out at the starboard quarter chock) and went into the Celtic Chief through the mid-ship chock on the starboard side of the Celtic Chief (Tr., p. 2666). (See to same effect the testimony of Piltz, Tr., pp. 1873, 1792, and Lewis, p. 3244).

This line Tullett could see from the Mikahala, and it "came from the midship chock along the side of the vessel over my line and then dropped down into the water" (Tr., p. 2666).

The other line, to port of the ship, Tullett could not see from the Mikahala that night (Tr., pp. 2667-8).

The position of *both* lines, at the stern of the Arcona "was *very similar to the line* that I saw leading from the Celtic Chief. It dropped down from the stern in the water probably about forty or fifty feet from the ship" (at the Arcona end). (Tr., p. 2667).

At the Celtic Chief end, the line that he saw: "I should say after it crossed my line where it dropped into the water there wouldn't be more than thirty feet in view. Thirty feet of the line in view" (Tr., p. 2667).

"Q. How frequently did you observe the Arcona's lines that evening, after the two were made fast?

"A. I observed them when the electric light came on. They were *in the same position then as they were before*. At the Celtic Chief end" (Tr., p. 2667).

Regarding any change of position of the lines "during the entire evening including the hour when it was dark," he testified "*There was no change in the position. * * * Because had there been any change the position of the Arcona would have changed with it*" (Tr., p. 2669). And also: "Outside of the reason that I have just stated, if there had been any work on her lines on board the Ship, I was observing the Arcona and the Celtic Chief the whole time from dark until the ship finally came off, *I certainly would have seen them working their lines, and the only possible difference on the lines that could have taken place would have been the slack of the lines. There was no*

possible chance of the lines coming tighter without the relative positions of my vessel and the Arcona changing; *that I can state positively and prove it*" (Tr., pp. 2670-1).

And on page 2673: "Q. Could the Arcona have gotten a strain on her lines without your having known it? A. No."

"I'm positive that the Arcona did nothing" (Tr., p. 2703).

Each time he saw the Arcona's line it was in the *same relative position* (Tr., p. 2703).

"I noticed her line over my line. * * * At the Celtic Chief. I had (a) particular object in watching that. * * * And that's the only place I observed it to take any notice of it" (Tr., pp. 2707-8).

Captain Piltz:

Captain Piltz left the Ship for the Mikahala at 11:30 (Tr., p. 1783).

"Her lines when I left the vessel were slack in the water" (Tr., p. 1791).

"The Arcona's line that passed to the *port* side of the Celtic Chief I did not see *where* that entered the water, but on the starboard side of the Celtic Chief, *why it entered the water abreast* of the quarter of the Celtic Chief" (Tr., p. 1791).

The Arcona line (there) led over the Mikahala's: "that's why I parcelled the line previously" (Tr., p. 1791).

"Q. About what angle did that line describe in coming toward the water from the point where it crossed the Mikahala line?

"A. It went directly up and down. It *slanted* up and down so there was no strain on it.

"Q. About how many feet do you think it was from the Celtic Chief to the point where the Arcona line entered the water on the starboard side?

"A. About ten or twelve feet" (Tr., p. 1792).

(Note: We think, from his other testimony, he meant here 10 or 12 feet from the *side* of the vessel at the water line).

He did not observe this line at the Arcona end (Tr., p. 1792).

"Q. You say you didn't see the port line?

"A. *It was not out of the water.* If it was out of the water *I would have notice(d)* it, the Arcona's line that was attached to the port side of the Celtic Chief." (And repeated). (Tr., p. 1792).

"Q. Did you, at the time that the Celtic Chief came off and immediately prior to that, did you observe the Arcona as she lay there?

"A. Yes, sir, I did. I noticed that she wasn't doing anything.

"Q. How?

"A. Her engines wasn't moving, there was no churning of the water directly from her stern, *and her lines were slack and hanging in the water.*" (Tr., p. 1793).

"I never noticed any difference (in her lines) from the time they had them fast until I left the ship." If there had been any difference he said he would have noticed it. (Tr., p. 1804).

He parcelled the Mikahala lines between seven and eight o'clock, nearer eight, "and at that time the Arcona's line was hanging loosely over the Mikahala's towing line" (Tr., p. 1988).

And as far as he knew it was in that same position until the time she came off (Tr., p. 2000).

Captain Nelson:

After the Arcona's two lines were connected, about seven o'clock, the Arcona did nothing further except to play her searchlight, and he could see parts of the lines at various times. Any time that he looked he could see them he could distinguish no change. (Tr., pp. 2780-81).

"Up to about seven o'clock in the evening after they got their lines fixed and stopped operations I didn't see any change in the lines."

"Q. If there had been any change would you have noticed it?

"A. I think that I would, yes, sir.

"Q. That is if those lines had been pulled up taut?

"A. *If the lines had had a strain on them so as to bring them about (above) the surface of the water I would have seen them somewhere between the stern of the Arcona and the Celtic Chief.*

"Q. As it was, how much of those lines, you say was out of the water where they left the stern of the Celtic Chief?

"A. Well, *there might have been forty or fifty feet* of the length of the wires. She was somewhere about twenty feet out of the water astern and they went down on an angle say of—I couldn't say. They went down so that they *looked to be leading to the bottom.*

"Q. And at the Arcona end approximately how much?

"A. I think there was less because her stern was lower down, but they led right down into the water. They didn't lead straight out as a line that was taut would lead." (Tr., pp. 2781-2).

"Not up and down. It hung at a small angle, say forty-five degrees for the sake of argument. * * * It was at a small angle out from the vessel's (the Arcona's) stern" (Tr., p. 2822).

(Note: The witness did not say on direct that the stern of the Arcona was twenty feet high above water, as indicated by counsel on page 2823; he said the Celtic Chief stern was about that, and the Arcona was lower down (Tr., pp. 2781-2).

Mr. Dowsett:

"They were running from the stern of the boat (Arcona) from the top of her poop deck in a

loose and slack bight. * * * They never changed their condition from first to last as far as my observation went" (Tr., p. 2091).

He made observations until going to take his nap. When he got up and noticed them again (Tr., p. 2093) they were "unchanged from what they were." And after that "They never changed. There was no change whatever * * * up to the time the vessel came off" (Tr., p. 2094).

On cross-examination, counsel suggested to the witness that the Arcona lines came from either side of her from chocks some 30, 40 or 50 feet forward of her stern" (Tr., p. 2122); and the witness rejoined that that may have been, but he saw the lines, "the way they went down against the side of the vessel—alongside"—but they nevertheless appeared to him further astern than indicated by counsel—they were "over the stern, if anything—the stern or to one side" (Tr., p. 2122). She had a rounded stern and the line went over, but not "directly" over (Tr., p. 2123). It was "very little forward."

"I saw the line going down into the water. I remember that quite distinctly. * * * Straight at an angle," and struck the water about 10 or 12 feet from the hull of the Arcona (Tr., p. 2124).

"Q. I understand you, Mr. Dowsett, to say that those lines used by the Arcona hung down at a very steep angle into the water, almost dropped down absolutely straight into the water from the stern of the Celtic Chief (Arcona)?

"A. Yes, they looked so to me; as if they were almost hanging over her stern there loose. * * * About a few yards away from the vessel where they hit the water. * * * To better explain it, and if my memory serves me right, the wires came out and formed a curve went out and down to the water.

(Mr. Warren: Indicating a *convex* curve).

"Yes, convex curve like that" Tr., p. 2152).

"I'm absolutely certain that she wasn't pulling" (Tr., p. 2156).

Mr. Lewis:

"I could see a line rather indistinctly from the —leading north from the stern on the port side of the Arcona; that line to the best of my recollection running down the side of the Arcona into the water. * * * The line as it entered the water did not make a very acute angle. I should judge that it was in the neighborhood somewhat, oh, anywhere from along about thirty feet * * * from where it left the vessel's side * * * to where it hit the water. The line approached slightly the perpendicular, more the perpendicular than the acute. * * * I saw *one* to the best of my recollection, the only line that I could see" (Tr., pp. 3222-3).

The time covered by the answers above was from 9:15 to 10 P. M. (Tr., p. 3223).

During that time he saw indistinctly a line which he took to be the Arcona's leading up to the starboard side of the Ship (Tr., pp. 3223-4).

During that entire period he saw no change in the lines (Tr., p. 3224).

Having taken a nap and come out again between 11:15 and 11:30 he saw that "There was absolutely no change in the Arcona from the time that I came out between quarter past nine and eleven thirty and when I retired at ten o'clock. * * * The lines were *exactly in the same position* as they were and which I had noticed prior to my retiring, that is the line leading down over the side of the Arcona went into the water near the perpendicular and coming out on the other side, on the starboard side of the Celtic Chief also entered, came out of the water and approached the side near the perpendicular" (Tr., p. 3225). (Repeated in part on pages 3226-7).

As to how much of the line was out of the water at the Celtic Chief end, he didn't want to give the exact number, but said "somewhere between say 40 and 60 feet; that is, beginning from where it entered the side." (Tr., p. 3227).

"I saw no change" (Tr., p. 3228). And see Tr., p. 3230.

Respecting the Arcona line at the Celtic Chief, "it seemed to run along, it seemed to be over the Mikahala's line and entered the Celtic Chief up over the side" (Tr., p. 3244).

(Note: This shows clearly the witness was not mistaken in taking that line for the Arcona line when he saw it less distinctly earlier in the evening).

From his position he could not say whether this line entered the water at the Celtic Chief inshore or offshore as respects the stern of the Ship (Tr., p. 3247).

Mason:

"Might be she had the lines in length, but she wasn't doing nothing at all." (Tr., p. 929).

Bringing them "to an absolutely taut position" — "*didn't happen*" (Tr., p. 929).

"Q. Just put her lines aboard and hung slack?

"A. Yes.

"Q. She didn't even draw them out of the water?

"A. She didn't (Tr., p. 929).

And see Tr., pp. 933-4.

"Her lines were slack from the time she dropped that anchor to the time we got the vessel off. That is the time I see them start up" (Tr., pp. 929-30).

Kennedy:

Said himself there are other ways of pulling a ship besides turning propellers, but said of the

Arcona "If she was pulling it wasn't manifested in the tautening of the cable" (Tr., p. 774).

And see Kennedy, Tr., pp. 761, 765-7, 773-4, 783-4, 796, 797-9, 799, 809.

The line to port side of Celtic Chief:

"If it was taut we would have a chance to see it.

* * * 'Because if it had been taut it would have been down less" (Tr., pp. 785-6).

Also:

See Clarke, Tr., pp. 1098, 1101-2; Miller, pp. 1376, 1570-1; Makalena, pp. 1339-40.

Independently of the testimony on the subject of the condition or position of the Arcona's *lines*, as bearing on the question of whether or not she contributed to the salving of the Ship, we rely upon two other factors, proving her absolute inaction. The first of these is that except for the one time when she broke her line some time between two and three o'clock that afternoon she did not at any time or for any purpose use her propellers—and they were not used until after the Ship was off and close up to the cruiser, and then only to get away herself and later tow the ship into deep water; and the second factor is that she did not do any heaving on her anchor chain, this being the only other way she could have exerted power aside from her propellers. These two points will be taken in the order suggested:

The Arcona did not use her propellers:

We might continue to make numerous and lengthy quotations from the testimony at large, to prove this fact, but inasmuch as the hopes of the Claimant were shattered in this regard on the production of the deposi-

tions of the officers of the cruiser herself, we will go the least possible length to indicate the proof:

The officers of the Arcona do not claim that the engines were used; their claim is that their lines were kept taut by heaving on her anchor chain. The claim as to heaving will be taken up shortly hereafter.

Captain Schroeder, in answer to I. I. S. N. cross-interrogatory No. 35, said:

"I do not remember if a signal was given *because the engines of the Arcona were not moved before the Ship came off*, but I remember that the steamers moved their engines at full speed from about eleven o'clock (Tr., p. 395).

Lieutenant Conneman, answering I. I. S. N. cross-interrogatory No. 19x, said:

"A fixed time for the commencement of working the Arcona's engines had not been proposed except in case the floating of the Celtic Chief could not be accomplished by means of heaving in the Arcona's anchor chain. *We did not need to resort to it* as we succeeded in floating her in the manner last mentioned before that time" (Tr., p. 434).

As indicating further that the cruiser did not use her propellers, we cite the following additional answers tending to show the claim of the witnesses here that the Arcona power was by means of heaving on her anchor chain:

Captain Schroeder's answers to: Direct No. 10 (Tr., pp. 382-3; Direct No. 30 (Tr., p. 387); Direct No. 36a (Tr., pp. 388-9); and Miller Cross-ex. No. 14x (Tr., p. 398).

Lieutenant Conneman's answers to: Direct No. 23 (Tr., p. 420); Direct No. 36a (Tr., p. 422); and Direct No. 38 (Tr., pp. 422-3).

For additional references to testimony in the transcript, that her propellers were not used, see:

Captain Henry: Tr., 103, 192-3, 212; Lonche, p. 515; Weisbarth, pp. 608-10, 632, 635, 637.

Captain McAllister: Tr., p. 87; Kennedy, pp. 762; 774-5; Bray, p. 861; Mason, p. 900; Piltz, pp. 1791-3, 2085-6; Macaulay, pp. 2315, 2510; Tullett, p. 2671; Haglund, p. 2910.

The Arcona did not heave on her anchor chain:

It being therefore clear that the Arcona could not have had any part in the pulling off of the Ship, so far as any propeller power is concerned, we turn attention to the only possible means she had left, namely, heaving on her anchor chain. And we submit that the record shows not only that she did not heave, but did not even intend to do so that night.

Notwithstanding the testimony of the officers of the Arcona that her lines to the Ship were kept taut by heaving on her chain, as indicated above, we submit that from all of the testimony aside from theirs she did not heave and could not have heaved on her anchor chain *because, if she had done so, she would have changed her position, and she did not do so.*

Mr. Kennedy:

Defined the position of the Arcona at eleven o'clock that night; with relation to the Mikahala, as:

"In the position of the Mikahala she was just lying at the stern of the ship (Arcona). * * * In

the stern of the Arcona on the side." "Perhaps 200 feet" between the Mikahala and Arcona. (Tr., p. 762).

"The Arcona wasn't moving. * * * We were watching her" (Tr., p. 766).

Referring to when the Celtic Chief had been pulled aside by the Mikahala, he said:

"Well, by this time then when she pulled thoroughly around the Arcona people got a move on" (Tr., p. 769).

"Q. Had she changed her position?

"A. (Not) until the Ship was on top of her so far as observation goes" (Tr., p. 775).

"Q. She might have, had she attempted to do so, exerted a strain on her lines by means of heaving in on her anchor?

"A. She could do it, but the lines so far as observation from the Mikahala, didn't show that she was doing so.

"Q. She could have done so?

"A. She could have done so.

"Q. And might have exerted a strain by means of her anchor?

"A. If she was doing that—

"Q. Do you think she could have?

"A. I don't think so because they—" (and here counsel shut off the adverse answer coming by changing the subject). (Tr., p. 775).

Compare the above with his further testimony, when, having said that the Celtic Chief made her first rapid move, coming say half her length, about a hundred feet (Tr., p. 783), and it was fifteen or twenty minutes before she moved again, he testified:

"Q. You still observed that the Arcona's lines were lying loose?

"A. Yes.

"Q. Never made any change at all the whole fifteen or twenty minutes?

"A. They were still lying down.

"Q. No change whatever?

"A. No change whatever so far as I could observe.

"Q. Even though the Celtic Chief had decidedly moved fifteen or twenty minutes before?

"A. That's my impression. At least *if they did they didn't take enough of the slack in to show.*

"Q. Let me ask you, Mr. Kennedy, when this sudden jump occurred, when was it that you had observed the condition of the lines of the Arcona with reference to that point of time?

"A. *We were doing nothing else but watching her lines* from half past eleven right on, somewhere about half past eleven, I should judge. All we had to do was to observe these lines on the ship." (Tr., pp. 783-4).

"Q. Now then, Mr. Kennedy, isn't it probable that the Arcona pulling on her lines or heaving in on her anchor chain *whenever the Celtic Chief would come*, at times her lines would slacken up and other times they would be taut so that your observation would not go to the extent of saying that she was not pulling?

"A. Well, it *might* be, but *it would require a good deal to convince me.*

"Q. Nevertheless it might be so?

"A. Yes, it *might be so*, but *I would be very doubtful about it*" (Tr., p. 798).

* * * So far as any outward manifestations were concerned; so far as we could observe from the outside. * * * Unless there was some demonstration to lead me to believe that they were doing the contrary, and there was none observable to me." (Tr., p. 799).

"No, I did not see the Arcona line at all except hanging down the side of the ship" (Tr., p. 809).

Captain Piltz:

Defined the position of the Arcona as being: "Her stern was about abreast of the bow" of the Mikahala (Tr., pp. 1967, 1788, 1834); her stern more toward the Helene than her bow (Tr., p. 1972); she was pointing more easterly than the Mikahala (Tr., p. 1981), not directly in line with her towing lines, as she had a bit of an angle to the eastward (Tr., pp. 1981, 1987). After the Arcona got into her position the distance between her and the Mikahala was between 150 and 200 feet (Tr., pp. 1788, 1984). She *maintained that position* from dusk on Wednesday afternoon until the Celtic Chief came off Wednesday night (Tr., p. 1971). "The Arcona did not move her position" (Tr., p. 1793); she did not move until about ten minutes *after* the Ship was floated (Tr., p. 1794).

When the ship began coming the Mikahala then pulling, the Mikahala forged ahead with the Ship and *gradually* got abreast of the Arcona, which lay still (Tr., p. 1985), and so continued until the Arcona instead of being ahead of the Mikahala as they were before the Ship began to come, was finally astern of the Mikahala (Tr., pp. 1793, 1992, 2031).

Had she put any strain on her anchor chain, to heave and pull on the Ship she would, on account of her anchor lying out ahead of the Mikahala (as hereinbefore indicated in this brief) have necessarily brought herself into line between the Ship and her anchor, and as the Mikahala was herself directly in that line (according to the testimony mentioned) the Arcona would have come gradually closer to the Mikahala, and, as her stern was in the first place a little seaward of or in line with the Mikahala's bow, the Arcona would herself have been ahead of the Mikahala, and in the same line from the Ship to the Mikahala extended,

and the Arcona line would have come up against or under or over or have fouled the Mikahala (Tr., pp. 1787, 1831, 1833, 1929-30).

Note further that the witness makes a distinction between "heaving" and "pulling." When he said that had she pulled she would have gone out to sea (Tr., pp. 1834, 1983) he meant with her propeller. On pages 1983-4 he said she could have "pulled" and kept a strain on her hawsers without interfering with the Mikahala—but she didn't pull.

Mr. Dowsett:

Made a sketch of the relative positions of the Mikahala and Arcona (Tr., pp. 2136-7), making a change in the position of the Arcona when he found he had gotten it pointing too straight to sea (Tr., pp. 2138-40). This sketch will speak for itself. And see Tr., pp. 2089-90.

Thereafter she was in the same position (Tr., pp. 2094, 2152) while the Mikahala moved forward (Tr., p. 1489) and got abreast of the Arcona (Tr., p. 2143).

Captain Macaulay:

Also made a sketch of the position of the Arcona (Tr., p. 2313) which she maintained thereafter; during the rest of the evening (Tr., pp. 2510-11).

"If she had hove an extra strain on her lines and chain cable it would (not) have altered the ship's (Arcona's) position. * * * to the southward and eastward * * * on account of where she had laid her port anchor" (Tr., pp. 2316-17).

Reference to the transcript will show the word "not" to have, apparently, been part of the witness' answer just quoted. This is only one of the multitude of errors

of the reporter, and we know the word "not" was used, as will clearly appear by his further testimony which follows:

"Q. How far from that would she move?

"A. She would move ahead *until the anchor would be in line with the keel of the ship.*

"Q. That would bring her where?

"A. Her bow over the southward and eastward.

"Q. And how with respect to the Mikahala?

"A. *She would then be on a line of crossing the Mikahala's bow.*

"Q. *Did she move* out of that position you have indicated on this map at any time during that evening?

"A. *She did not.*" (Tr., p. 2317).

Captain Tullett:

Made a sketch showing the position of the Arcona and her anchor chain, with respect to the Mikahala (Libellant's Exhibit H). When she took up that position indicated by the sketch she did not thereafter change her position in any way during the operations (Tr., pp. 2659-61, 2665, 2669-70).

The Mikahala moved out (Tr., p. 2677).

Had there been any change of position of the Arcona lines the Arcona would have changed with them, because her anchor was where it was. Her lines had been taut enough to keep her in position, but had she left (hove) them taut she would certainly have come closer to the Mikahala (Tr., p. 2670). "If she hove until she got her lines taut to the Celtic Chief she would foul the Mikahala" (Tr., p. 2671).

Captain Nelson:

Viewing from the Helene the position of the Arcona had it fixed with reference to the buoy of

the Miller anchor, which was almost in line with where he was on the upper deck of the Helene (where he was most of the time) and the quarter deck of the Arcona, and about 50 feet away from the Arcona (Tr., p. 2782).

He could see that buoy all the time, and its relative position to the Arcona did not change at any time as far as he could see (Tr., pp. 2782-3). The Arcona didn't move until the Celtic Chief was almost on top of her and then they steamed away quick. (Tr., p. 2783).

Captain Haglund:

Not up to the time Ship was floated was there "any visible change" to him.

He went out in a boat, passing among the vessels, going from the Helene to the Mikahala and vice versa, and in that way went "right up against the Arcona's stem with the boat and possibly *within two or three feet of her anchor chain. It was hanging perpendicular altogether at that time*" * * * "on the port side" (Tr., p. 2909). "At that time" was "shortly before eleven o'clock" (Tr., p. 2908). He put his hand on the stem of the Arcona (Tr., p. 2909). He also passed within 20 or 30 feet from her stern (Tr., p. 2909), and would certainly have known it had her lines been taut (Tr., p. 2909).

"She did not" heave on her anchor chain at any time that night. Asked how he knew this, he said that part of the time that night he was aboard of her (Tr., p. 2909), a little before ten o'clock. As to other times "if she had heaved on her anchor chain at any time that night * * * it would have altered her position," on account of her anchor being away off to windward—"it certainly would have brought the Arcona closer up against the Mikahala" (Tr., pp. 2909-10).

She did not change her position at any time after six o'clock that night until the ship came off. She could not have changed her position without his knowing it "because I was there all the time" (Tr., p. 2910). "If she had used her propellers she would have tightened up the wires, which she didn't do" (Tr., p. 2910).

Captain McAllister:

"She lay still" (Tr., p. 97).

McAllister was on the *Interpid*, anchored out westward of the *Helene*, at a point where the *Helene* cut off his view of the anchor chains of the *Arcona* (Tr., p. 98), but he could see her stern and the Miller anchor buoy (Tr., p. 97). He said he knew the *Arcona* was not heaving on her anchor chains because in that case "she ought to have left the division between the vessels, the space, which she did not." He said that from his position he "certainly could" tell that she did not heave on her anchors, as *he* was "laying still" (Tr., p. 97).

Counsel for the Claimant was willing to admit, to prevent any exact inquiry from Captain Henry of the way the *Arcona* moved when the Ship came off, that the distance between them "very materially diminished" (Tr., p. 193).

Captain Henry:

Could not say whether the cruiser did anything after the first or second signals (Tr., p. 218).

Add to the testimony itself the argument: That had the *Arcona* in any way have gotten her lines taut to the Ship, by heaving on her anchor chains, it is elementary that there would be just as much strain, in pounds, at every point in the line between the Ship and the *Arcona anchor*, and consequently as much strain

on the chain, in pounds, as on the lines astern. Then, on the Ship coming off the reef and floating free, and the lines coming *slack* down loose—doubling up and circling on the bottom—as they must have by the time the ship got so much nearer the Arcona (as will subsequently be indicated)—the absolute relaxation of strain on the lines astern would have been eased off by the Arcona moving forward toward her anchor. Her position would necessarily have changed immediately and rapidly in the direction of her anchor. But, by all of the testimony, she *did not move* until the Ship was very close to her.

The trial Court observed that the Mikahala's anchor was also laid to her port "side" (meaning, surely, to port of the direction of her bow), as far over to port as was the Arcona anchor (Tr., p. 3361). Nevertheless, when the Ship first began to come, some moments before she came free, the Mikahala "was out already and to the port side further when (where) the Arcona was through heaving up the anchor" (Tr., p. 2677). *She* was able to move over and did move over when she hove on her anchor. It was not until the ship was soon thereafter *afloat* that the Mikahala changed for the side pull (Tr., pp. 2677-8).

Counsel thought to negative this argument by showing that Miller's *anchor* didn't move seaward when the Ship came off (Tr., p. 255). We will match the point there by admitting that neither did the *Arcona's anchor* move seaward. But if she had had *any* strain on her anchor *she* would necessarily have moved

toward it upon any lessening of the strain on the *rear* line. Yet when the Ship came off the Arcona *didn't* move forward.

Finally, however, it is not within reason to argue that the Arcona, even if she *had* heaved on her anchor chain, as maintained by her commander and executive officer, she could have done more than a small share of the pulling which took off the Ship. Any strain by her could not have exceeded the horsepower—not of her propeller, but of her anchor winch; and we have absolutely no evidence of what that power might have been. The heaving, if any, was not on either of the lines directly, but on the anchor chain (Tr., p. 383). It cannot be presumed that her anchor winch was of any greater power than reasonably or usually required for its purpose—to handle a 2.48-ton anchor (see below). And however powerful her winch may have been, its usefulness would still be limited by the holding power of the anchor. The Arcona had two anchors on board, their weight being 2,250 kilograms each (Schroeder, Tr., pp. 381-2), *but she only used one of them* (Schroeder, Tr., pp. 386, 392; Conneman, Tr., p. 420). As 1 kilo equals 2,204.6 pounds, the Arcona anchor weighed 4,960.3 pounds, or 2.48 tons. Conneman thought the Arcona had out about 85 meters (equals 276 feet 2 inches, or 46 fathoms) of anchor chain (Conneman, Tr., p. 428). To arrive at the weight of this 46 fathoms of Arcona anchor chain we must, for lack of anything else in the record, make a fair comparison with the Helene anchor chain. The He-

lene carried anchors of about 2,000 pounds each, or one ton, and the Arcona anchor was 2.44 tons. For her one-ton anchors the Helene used anchor chain weighing 128 pounds per fathom (Haglund, Tr., 3066): Surely double the size anchor chain of the Helene is almost doubly generous as an allowance for the Arcona chain, but, taking it as *double*, 46 fathoms of Arcona chain at 256 pounds per fathom would weigh 11,776 pounds. *The Arcona anchor and chain, together, therefore, weighed 8.318 tons.*

We have already, in a comparison of holding power between the Helene's anchors and Miller's anchor shown that *the Helene had out a weight, in anchors and chain, of 11.6 tons* (See page 84 of this brief).

It cannot be said, then, that the Arcona, with 8.318 tons weight out, to heave on for pulling purposes, had any advantage in that respect over the Helene, with 11.6 tons out ahead to heave upon—the *Helene using her propeller in addition*, and the Arcona *not* using her propellers. Captain Schroeder thought the Arcona had out about 100 meters of anchor chain (Tr., p. 392). That would add 15 meters, or 48 feet 9 inches, equal to about 8 fathoms, which, at 256 pounds per fathom, would add 2,048 pounds, or about one more ton to the weight out ahead of the Arcona; *i. e.*, it would give the Arcona 9.318 tons against the Helene's 11.6 tons. Besides, the Helene had the advantage of the far longer chain out, which is a large advantage, as heretofore indicated, and could therefore have exerted greater power on her anchors before

bringing them home than the Arcona anchor could have withstood. The Arcona witnesses could not tell the power of her capstan, nor how much strain was put on her anchor chain (Schroeder, Tr., p. 387; Conneman, p. 428); and on the other hand, the Helene's anchor capstan was 45 H. P., to which, by her propeller, she could add 3.11 tons.

Captain Haglund testified that all the power that could safely be put *was* put on the Helene anchor chains (Tr., pp. 2894-5). There was nothing special about the character of the Arcona anchor winches. They were "for weighing anchors" (Schroeder, Tr., p. 381). And see "one anchor winch" (Conneman, Tr., p. 417).

Captain Schroeder admitted in effect that he could not say *what power* moved the Ship, "several strains being in action to pull that ship, *i. e.*, the hawsers of the Arcona, the cables of the steamers, and that steel cable leading to the seven-ton weight." (Tr., p. 397).

It may further be said that the mere fact that the Ship in coming off the reef headed toward the Arcona does not warrant any claim that the Arcona—or Miller's anchor—pulled her off. She would naturally have moved that way, with the Inter-Island steamers balancing each other (see Tr., p. 3154) and pulling from both sides of her stern (Tr., pp. 802, 805).

Again, *if* the "high tide coming in might have been the cause of the starting of the Celtic Chief" (see counsel's question, Tr., p. 2153), then, we reply, the credit still belongs to the lighterers—not the Arcona.

Moreover, we have said that the Arcona did not even intend to pull that night. Finding Haglund obdurate, and intending to pull toward midnight, signals were made up between them.

Before the Arcona's advent, it appears that by the Inter-Island program, understood by Captain Macaulay and Captain Henry, when the Ship was floated the Mikahala was to take care of her. After the Arcona came out her commander wanted this privilege—the gallery play (Tr., p. 2318), and, Captain Haglund being informed of it later, went on board the Arcona that evening to confer about it to prevent any misunderstanding in maneuvering (Tr., p. 2911).

Captain Haglund tells us that having gone on board the cruiser, he went to the room of the executive officer and the latter "expressed a very strong desire for to *delay operations* until daylight—'so we could see what we were doing,' he said. I told him we couldn't do that. We had to try to take the ship off at the first opportunity. That was (to be) at high water, which will be after midnight that night, so *he said he was in no position to tow because he knew that he would break his small wires* that he had out, and furthermore that he didn't like to cut them * * * He didn't like to cut them and *he was afraid if he start the engine and break them, as he was pretty sure he would, that he would get them tangled in his twin-screws, so that arrangement* (was made) *for the signals to be given as I got here.*" (Tr., p. 2913). And see Tr., p. 3367.

Captain Haglund then produced the identical paper, written by the executive officer at the time (Tr., p. 2913), which paper is in evidence at Libellants' Exhibit "N" (Tr., p. 2915).

Thus, even at the critical time, when the floating of the Ship was reasonably to be expected on the midnight tide, the Arcona wanted to wait until morning. For losing a tide salvors have been penalized.

The Diadem, Fed. Case No. 3874;

Roberts vs. St. James, Fed. Case No. 11914.

It was further arranged between the executive officer and Captain Haglund that night on board the Arcona that the Mikahala line should be cut last to permit her to sheer the Ship and prevent getting in the cruiser's screws: "That was agreed upon between myself and the executive officer because he was kind of timid about his twin screws and his two wires, so I agreed with him that the Mikahala will be the boat that won't be cut away until the Arcona was safely clear, which was carried out" (Tr., pp. 2919-20).

Here we wish to mention that Captain Haglund, in agreeing to cut the Mikahala line last, did not mean that this arrangement might be accepted as relieving the Arcona from any necessity of moving herself at all, and that the Mikahala was to be insurer of the safety of the Ship and the Arcona. This visit was made prior to the time the hard pulling was to begin. The paper that Captain Haglund brought into court, prepared by the executive officer himself, shows on its face that there were to be signals for pulling full speed

and special signals for the Arcona's benefit, to advise when the Vessel started, and when it moved rapidly, and when afloat. We can see no object in arranging signals of that kind, unless to allow the Arcona to know when to pick up and move. It cannot be said that Haglund would even suspect that the Arcona would lie absolutely dormant and do no pulling at all. Haglund would certainly be justified in expecting, when he arranged this with the Arcona, that the Arcona would do *some* pulling when the tide had come higher; and, with *any* pulling, even by chain heaving, the cruiser would certainly have gone forward some distance at least. Captain Haglund was merely by his agreement to cut the Mikahala last, giving the Arcona officer the benefit of the assurance that the Inter-Island Company would not, by insisting upon pulling that night, unnecessarily jeopardise the propellers of the cruiser on account of wires and lines in the water.

Were this not the case, Captain Haglund would not have become uneasy at the inactivity of the cruiser or thought it necessary to urge the Arcona officer, as the Ship was coming off, "Ain't you going to start your engines?" (Tr., p. 2916).

When the ship was making her final rapid move off the reef, Captain Macaulay noted the inactivity of the Arcona and said to the executive officer, "Why don't you steam ahead?" (Macaulay, Tr., pp. 2528, 2530); * * * "steam ahead with your ship"; and the answer was "*We can't* steam ahead." Macaulay then said "Heave away on your anchor, *do something* to

get away"—and they heaved on their anchor and then went ahead with the propeller (Tr., p. 2535). At that time Captain Macaulay said he "was under the impression that the Arcona was ready at any instant to give assistance to the Celtic Chief" (Tr., p. 2534). Therefore, not until matters looked serious did he so approach the officer. This phase of the operations was further testified to by Captain Macaulay when he gave the explanation why they couldn't steam ahead. "He said he couldn't do it on account of being afraid of getting his heaving lines in his propeller" (Tr., pp. 2539, 2562-3).

Captain Haglund says also (as above indicated) that when he noticed the ship approaching the Arcona pretty closely in coming off, he went up to the executive officer and said, "Ain't you going to start your engines? Anything happen to Mikahala hawsers, there might something happen"; to which the officer replied, "I just give the signals to start in." He fired three white stars. "That's how I found out what them *white* stars were for." (Tr., p. 2916).

Again, when the cruiser once started up her engines, she evidently wanted to get her lines out of the water and get out of that vicinity. Mr. Kennedy says she "got a move on" (Tr., p. 769); Tullett says "all at once" (Tr., p. 2677), etc.

When the Arcona started off seaward with the Ship she kept going until at about three-quarters of a mile Captain Macaulay asked the executive officer to please turn around more eastward toward the anchorage. "We

were going at a rapid rate further out to sea" (Tr., p. 2323).

"He informed me that the commander said that he didn't wish to turn the ship on account of fouling his propeller with those lines. I suggested that he would let go one wire, one wire was sufficient to tow the ship, and they did let go one wire," which the Ship hauled in. "Then he swung his ship and went slow, but in approaching the anchorage, after making this great big circle he hailed, the commander of the Arcona hailed his executive officer and he told him he did not wish to pull any more, that he wished to let go his line entirely. The executive officer told me what the commander wished. I said, "Why, we are *in the open sea* and if you're going to let go your line after making an arrangement to tow the ship to an anchorage, (—) the thing is impossible if we have no Inter-Island boats"

* * * "He replied that he *had to carry out the commander's orders and let go the line*. The boat's crew came from the Arcona and took the executive officer on board his own ship, and that was the last that I had anything to do with the Arcona." (Macaulay, Tr., pp. 2323-4).

Captain Haglund shows, again, the disposition of the commander as respects the safety of the Arcona versus the safety of the Ship. He says "He (Captain Henry) asked me if I would give him a steamer, *as they had to let go, as the Arcona demanded her wire let go from the Celtic Chief*" (Haglund, Tr., 2924). Captain Haglund said, "I told him yes, after the Arcona wire

was gone" (Tr., p. 2924). Apparently Captain Haglund didn't want to share any more responsibility for the ship while the Arcona was executing her "simple nautical maneuvers" (as Conneman, Tr., p. 433, described them).

We find other points wherein we submit a doubt is thrown on the reliability of the testimony of the Arcona officers, as to their pulling on and moving the Ship, compared with the time she first moved.

Captain Schroeder, answering direct interrogatory 10, said that he ordered his hawsers kept taut by heaving in the chain as soon as the hawsers would slacken (Tr., pp. 382-3), which heaving, according to his answer to direct interrogatory 36a, was continuous during the three hours preceding the floating of the Ship (Tr., p. 388). Continuing in his answer to direct 10, where he says that the ship was floated at 11:30 P. M.: "By this time I had hauled in about 25 meters of the chain from the time the hawsers had been hauled taut" (Tr., p. 383). Passing now to I.-I. cross-interrogatory 32, which was (Tr., p. 374): "Where were you when the Celtic Chief was floated, *and how long had you been there?*" his answer was "I was then at a place 25 meters further seaward from that place where the hawsers had been hauled taut at about 6 o'clock. *I do not know how long time*" (Tr. p. 394).

So if, as he further said in answer to I.-I. cross 34, "The last pulling began * * * after the two lines had been fastened to the Celtic Chief" (Tr., p. 395), the sum total of his testimony is that the Arcona, in its heaving

from six o'clock on, on the "last pull," advanced seaward, moving the Ship at least 25 meters, or about 81 feet, either gradually from six o'clock onward, or in any event prior to 11:30 p. m.

Perhaps he meant, or his foregoing answers allow a meaning, that the moving of the Ship these 81 feet was done after 11 o'clock, as he said that he went on board the Ship at 11 o'clock (Tr., p. 396), and was on board *when she began* to move (Tr., p. 398); and that "when we had stated that the Celtic Chief was moving seaward I returned on board the Arcona as quickly as possible and ordered the anchor to be weighed. Meanwhile I got the signal * * * that she was floating" (Tr., p. 399).

Lieutenant Conneman said, answering I.-I. cross 6 (part 9 of answer): "I have personally observed that the Celtic Chief seemed to be moving *during the first heaving in of the Arcona's chain*, as far as this could be ascertained by means of bearings" (Tr., p. 425). Read this in connection with his answer to I.-I. cross 33, "The Arcona continued to tow *from 6:30 in the afternoon* (which was the beginning of the final tow) *without interruption until the floating* of the Celtic Chief" (Tr., p. 430). This testimony means the Ship moved gradually from the first heaving, beginning at 6:30 P. M.

We think the evidence of the other witnesses far overbears that of the Arcona witnesses as to the time the Ship first moved seaward, which was not until about quarter to twelve o'clock. Any movement prior

to that time was not seaward, but was more one of rolling and working and getting more lively.

To present the testimony as briefly as possible, without quotations, we think the citations given below will bear out the general statement: That the ship began to move in her bed, rolling and getting livelier along toward 11:30, and continuing this until some time shortly before quarter of twelve (Piltz, Tr., p. 2729; Dowsett, pp. 2093, 2098-9; Macaulay, 2297-8; Lewis, 3227-8); and along about quarter of twelve made her first seaward movement, which movement was very slow at first and those who had bearings and could first detect it (Dowsett, Tr., p. 2099; Macaulay, p. 2299; Henry, p. 153). Haglund, who had good bearings, theretofore, examined them when he came on board the Ship at about 11 o'clock, and states positively that up to that hour there was *no change* (Tr., p. 2917), and he first noticed her moving seaward at quarter of twelve (Tr., pp. 2917, 3040, 3045), which tallies with the time this was noticed by others: (Piltz, Tr., pp. 1781-2, 2729; Henry, pp. 152, 261; Brisco, p. 326; Tullett, p. 2671; Lewis, p. 3227). We should mention also that several of Miller's witnesses claim she *bumped* earlier in the evening (Tr., pp. 676, 1251), and Miller himself claims she moved several feet by nine o'clock (Tr., p. 1539). Having made her first seaward movement, it seemed to several of the witnesses that she came a little and stopped, with perhaps fifteen minutes' time between her two decided moves, and came again: (Kennedy, Tr., p. 764; Piltz, p. 1782;

Dowsett, pp. 2098-9; Tullett, p. 2677; Haglund, p. 3040); but gradually increased her momentum: (Kennedy, Tr., pp. 764-5; Dowsett, p. 2133; Macaulay, pp. 2290, 2292, 2298; Nelson, p. 2790); until she was off at about 12:20 (Kennedy, Tr., p. 764; Piltz, pp. 1781, 2029; Brisco, p. 327; Lewis, p. 3228; Nelson, p. 2790). Those who timed by watch say she came off at 12:20 (Tullett, Tr., pp. 2671, 2720; Haglund, p. 2918). By the engine clock Lycett said it was 12:22 (Tr. p. 2855). Macaulay gave it from his memorandum as 12:20 (Tr., p. 2289); and finally Captain Henry said he thought her first move was about 11 (Tr., p. 140), and later he saw her "making way" (Tr., p. 140), until she was afloat at 12:20, but not off the reef at 12 (Tr., pp. 126, 126-7, 153, 231-2, 232-3).

How, then, could the Arcona have been gradually moving the Ship seaward from "the first heaving of her chain," which, by the Arcona testimony, began at 6:30 that evening? And how could they have noticed her moving seaward at 11 o'clock, at which time the commander says he hurried back to his own vessel, and before he got there had the signal that she was afloat; and how was she afloat at 11:30?

In short, the case is made out, it seems to us, that the officers of the Arcona, mindful of the safety of their propellers, were timorous and gingerly in their operations. This led them to lie to their anchor, not intending to have the vessel come off that night, not intending to pull on her themselves and not wishing the Inter-Island to pull that night. They even *asked for delay*,

which was rather inconsiderate of the Vessel, at that time of year, it being inconsiderate in any case to let a ship lie stranded one day or hour longer than is necessary to get her off. They wanted daylight for their operations. Being told by Captain Haglund, however, that the Inter-Island would not let the midnight tide pass, signals were arranged for the benefit of the Arcona, to give her notice when the Ship moved. Again, the truth is that they still intended to make no pull themselves that night, and relied upon their judgment that the "little tugs" could not move her, and were therefore taken unawares; and the carefully arranged signals (which might even have been more elaborate) which would have taken some time to send off intelligibly, were shot off in a bunch, green lights and all (Tr., pp. 2083-5, 2916, 3154; Lowry, p. 314), so great was the need of getting the last one—the Ship is afloat. They were simply unprepared—ignorant of the fact that for half an hour at least before the ship came off she was beginning her seaward movement, for, had they known it, the first of the signals would have been given about half an hour before the Ship was off; and, had they known it, one or the other of the cruiser's officers would have been able in that half hour to have returned on board and been there to give orders to move in some way. As it was, the commander *ran* to get off the Ship (Haglund, p. 3062), so he must have learned rather suddenly that she was moving. As no ship moves without the officer in charge being on board,

and as, as a matter of fact, the commander didn't have time, on his own testimony, to get back to his ship from the time he learned the Ship was moving until she was off, it is clear that the Arcona stayed in her position because *waiting for her commander*.

When he got on board—*then* the Arcona moved.

What their signals were to be may be gathered from the following references: (Tr., pp. 609, 647, 670-1, 2319, 2571-2, 2913-17; Henry, pp. 217, 249-50; Brisco, pp. 327-8). The manner in which they were actually given may be concluded from the following further references: (Tr. pp. 609, 648, 671, 692, 767; 823, 898, 1038-9, 1237, 1272-3, 1293, 2321, 2571-2, 2551-3, 3154; Henry, p. 140, 217-18; Lowry, pp. 312-13, 315-16; Brisco, pp. 327-8, 340, 352).

If the Arcona officers were in good faith expecting to pull on the Ship that night, one of them should have remained on board. A vessel dares not move without someone in command on board.

Reaching, then, the time of the floating of the Ship, we find further evidence of hindrance by the cruiser. Both Macaulay and Haglund had to urge her to steam ahead and get out of the way that night (Tr., pp. 2916, 2528-30, 2535). Her screw hit Miller's anchor buoy (Tr., p. 1695), and her wire probably fouled the buoy and tore it off (Tr., pp. 599, 687).

There was a good deal of justice in Miller's bitter denunciation of the Arcona—her "opera bouffe," as he called it (Tr. p. 1364).

The best way to get a ship off is usually the way she got on (Haglund, Tr., p. 3146).

The Arcona's officers say they towed the Ship to a "place of safety" (Henry, Tr., p. 141). Conneman says they handed the Ship over (Tr., p. 431), to which Schroeder adds "near the entrance of the harbor" (Tr., p. 383). Macaulay says they left her in the open sea (Tr., p. 2324), despite his protests against the cruiser casting the Ship off at that place when her arrangement had been to take the Ship to a safe anchorage.

Her towing of the Ship to sea was badly done, because no ship can tow with two lines (Tr., p. 1660).

Also, the Arcona's lines entered the *midship* chocks on either side (Tr., p. 1785). During the afternoon the line on the port side, being over and resting upon the Mikahala's line, was parcelled to the Mikahala line where the latter entered the starboard quarter of the Ship (Tr., pp. 1785, 2666, 2922). When the Arcona began to race seaward, one line (on the port side of the Ship) broke or was cast off, and she was dragged *quartering*, and necessarily moving more or less like an unbalanced kite would do, until the tricing (or splicing) broke at the port quarter, whereupon the line naturally began to pull amidships. The result will have to be imagined, because the court reporter has made a sad mess of Haglund's answer on page 2922. Enough appears, however, to indicate that the witness said, in effect, that when the tricing line parted something happened. It (the towing line) swung out so that the broadside pulling, at the point amidships,

canted the Ship, and by the violence it was thought "the whole mizzen-top was coming down."

For further references as to how the Arcona towed the Ship, after she was floated, see Tr., pp. 482-3, 769, 1365, 1658-60, 1660, 2322, 2323-26, 2292-3, 2677.

Captain Schroeder says he got the Ship off at 11:30 and that at 1:30 "one of the tugs took over the Ship" (Tr., p. 383). Accepting his *own time*, he was *two hours* getting that Ship to a "place of safety" after she was *off*.

For many other references throughout the testimony, indicating lack of good seamanship on the part of the Arcona, see Tr., pp. 777-8, 778-9, 939-42, 960-1, 1365-6, 1659-60, 1678, 1785, 1789-90, 1805-7, 1849-50, 1929-31, 1949-50, 1952, 2429-30, 2507-8, 2534-39, 2671-2, 2900-1, 2962-4, 2108-10.

Taking the evidence as a whole, the bare fact stands out that the Arcona spent from noon until six or seven o'clock in "maneuvering" before she was able to get lines connected with the Ship which were not afterwards broken, but which, even then, certainly *would have broken had she tried to pull* on them. They were no stronger than before.

Looking at the time consumed by the Arcona, it does not compare favorably with the manner in which the Helene went to work. The Helene arrived on the scene about seven o'clock on Tuesday morning and dropped *two* anchors, rigged a bridle and had everything taut and ready for pulling and began pulling before eight o'clock—less than an hour, and was a

useful factor continually (Tr., pp. 3023, 2272). The Mikahala came out on Tuesday morning, dropped her anchor, ran a line and equipped a bridle and was ready for towing and began towing within *fifteen minutes* (Tr., p. 1764).

One witness said the Arcona was "maneuvering around all afternoon" (Tr., p. 1694).

We should, however, give the Arcona credit for her searchlight; it helped the others a little.

It is claimed that her commander advised lightening the Ship and putting out a stern anchor. As to lightering, this was already under way, and when Captain Henry found that Miller had stopped, it was continued by the Inter-Island. As to putting out an anchor, the advice was hardly necessary. He offered further advice, namely that a line be run from the bow to the Ship to slew her around, and get her off that way—advice which was rejected by all the others as being most unseamanlike and certain to increase the danger of the Ship (Tr., pp. 2328, 2925).

OPERATIONS OF THE MILLER SALVAGE COMPANY.

Until the trial of these cases we were not ourselves aware of the really small part the Miller Salvage Company took in the real salvage operations.

It is true that the lightering done by him was ultimately of considerable advantage to the vessel, he having taken out 246 long tons of the cargo (Watkins, Tr., p. 1201) which served to decrease her floating draft

by 8½ inches (see Tr., p. 2296) ; but there is a question how much *better* her situation might have been if he had not tied his vessels to the stranded Ship, which by his own admission increased the drag shoreward on the Ship because she had to take the brunt of the swells not only against her own stern but against these barges hanging on to her (Tr., p. 1548, and see Henry, Tr., pp. 258-9), and, we think, so far as the Ship did continue to go further toward shore, this was a largely contributing cause (Tr., p. 1550). Taking it from another point of view, it may have been that but for the added resistance of these clinging barges, the Mauna Kea and Intrepid might have gotten the vessel off with the advantage of the lightering under proper conditions. Although he said he could not have anchored his vessels alongside (Tr., pp. 1443-45), we think he could have done it as well as the Inter-Island Company anchored their donkey barge (Tr., p. 2008).

It is also true that Miller's lightering operations involved more difficulty than ordinarily attends such work, and perhaps some danger to his barges, on account of their heaving and surging in the swell alongside the Ship. But, aside from this, the work was done in an ordinary way, in stevedore fashion, by stevedores working hard and working overtime to be sure, but hired at specified rates, and incurring no danger to themselves. In Miller's own words, his removal of cargo was under nothing more or less than a *lightering contract* (Tr., p. 1667), entered into by him with Captain Henry against his own advice and wishes, he dis-

claiming responsibility for what might happen to the Ship by lightering without first putting out a stern anchor to hold her (See Tr., pp. 1351-2, 1548-9, 1614, 1623-4, 1681-2). In other words, Miller's lightering work was on a contract and not on a salvage basis, and he so regarded them himself.

Nor is it to be denied that Miller's anchor, placed astern, contributed in some measure to enabling the Ship to make her initial move from the reef; but it is submitted that an analysis of the situation will show that in any case his outfit was really a comparatively small factor in the power applied, and that it became wholly useless in any event as soon as the Ship had given ground at the first motion. Although the Ship afterwards stopped again, having stirred a little, Miller's power was not again brought to bear. We are satisfied that the trial Judge accorded too much credit to Miller's part in the work.

It cannot be said that Miller conducted his operations scientifically. Had he been left to his own devices he would have left his anchor where he dropped it the first time on Tuesday evening off the port quarter of the Ship (Tr., p. 2237).

Miller says he advised Capt. Henry to lighten the Ship, and also said he had an anchor which he advised be put out astern at once, (Miller, Tr., p. 1351; Henry, Tr., p. 132), which advice he says was not taken. Henry says he *did* ask Miller, at 8 o'clock Monday morning, to bring out his anchor (Tr., pp. 248-9). Miller, however, instead of using one of his vessels to bring out

the anchor, used them all for lightering, when he might and should have brought the anchor out on the first trip of the Makee when the Makee was actually under steam, instead of loading the Makee with fertilizer. He finally did get the anchor aboard the Makee late Tuesday afternoon (Tr., p. 1353), and was then delayed by the inspector forbidding use of the Makee's engines, because of his failure to keep the engine up to regulations. In consequence the Makee had to be towed out by the Mokolii (Tr., p. 1585). The Makee in tow of the Mokolii arrived at the Ship with the anchor about dark on Tuesday night (Tr., pp. 1605, 1631, 2926), and by the weight of the evidence Miller took the Makee to a point off the port quarter of the Ship and there dropped the anchor in shallower water than where the Ship lay (Macaulay, Tr., pp. 2237-41; Haglund, Tr., pp. 2926-7, 3144-6; Miller, Tr., p. 1577), and sent a surf line by the Mokolii over to the Ship, expecting to have it taken on board and made fast, for which purpose Capt. Scott of the Mokolii threw a heaving line on board. Upon Capt. Macaulay's advice, however, the line was not made fast but was thrown overboard again because the anchor was in a very bad position for pulling on the Ship, as it would have tended to make her go broadside, and inclined her towards shallow water besides (Tr., pp. 2238, 2927, 3145-6, 2234, 2260-1, 2637-9).

Angered because of the rejection of his line, Miller had a stormy interview with Capt. Henry in the morning, in which he says that he threatened to take his

whole outfit ashore and leave the Ship to her fate, besides which he would see that Capt. Henry had his license cancelled (Tr., pp. 1355, 1624, 1640). Miller was told that if he would take up his anchor and place it where directed astern of the Ship his line would be received, and he met this condition and moved his anchor (Tr., pp. 2238-9, 2928).

By the testimony of his own witnesses the rigging of Miller's blocks and tackles, and working of them to get the slack taken out of his anchor line, covered practically the whole afternoon, and it was not until late afternoon or along toward evening that he finally got his line fairly taut (Tr., pp. 1032, 1250, 1330, 279, 296).

Without going into the quotations of evidence pro and con, as to whether or not the Miller line thereafter continued taut or not taut, we think the testimony as a whole shows that Miller did for a part of the time get a fair strain on his anchor; but we maintain that, as he was using new lines in his tackles, a good part of the capstan work, until late in the evening, merely went to take the stretch out of the ropes. He did have some strain. We think Capt. Macaulay favored him a great deal in saying he had a powerful strain. But Miller's strain was in operation at best only until the Ship first began to move, and to some extent was an *aid* in *starting* the Ship. After the Ship once moved Miller's line was thereby slackened and he was unable to shift his tackles in time to get another strain upon his line. This will appear by a brief reference to the manner in which

Miller's tackle was rigged. He had three pairs of blocks, the first two having three sheaves in each block, and the third pair having two sheaves. It follows indisputably, as is explained in detail by Capt. Haglund (Tr., p. 3136-8), that in order to move the main block where shackled to his anchor line, a distance of one foot, or in other words, in order to bring the pair of blocks on the main tackle one foot nearer together, it was necessary to take in 144 feet of rope on the third set of blocks. It follows that if the block on the main tackle attached to the Miller line were to move say 5 feet in a minute (or any other given space of time), the 144 feet necessary to be taken in to *do that* would have to be taken in during the *same interval* of time, i. e., it must travel 144 times faster than the main block on the line. In other words, if the Ship, once started, moved even as slowly or as much as 2 feet a minute, Miller had to get in 288 feet of line in that same minute,—*just to keep even*. And no capstan could be turned fast enough to do that, and Miller had his line *to the capstan* when the Ship started, for he didn't use the winch after nine o'clock (Tr., pp. 1663-4). Therefore he was unable to take up or keep pace with the slack. And besides, as the distance from the foremast to the after block of the second luff tackle was not over 120 feet, the second luff tackle would have had to be fleeted at the rate of a little more than once for every foot that the main block would move. Fleeting the tackle was no easy matter with the heavy lines, and it took time. The evidence as a whole really shows, we

think, that when the Ship had started and made her first move or jump, coming half her length or less, and then stopped, *that* was the time Miller's tackles "dropped" the first time, and, the Ship having made this first move and stopped again for perhaps 15 minutes, Miller was able to take in the slack, fleet his tackles, and turn the capstan again. But it is in evidence that his hawser and wire were shackled together with a large iron shackle (Tr., pp. 2625-9), at a point, after his line was first fairly taut, 30 or 40 or even 60 feet astern of the Ship (Tr., pp. 2287-8, 2241-2, 2434). The movement of the Ship so far slackened his line that when he hauled in on his line during the temporary stay of the Ship, it came in freely until the shackle reached the outside of the chock at the stern of the Ship, and being too large for the chock, stuck there (Tr., pp. 2288, 2629, 238). It followed that Miller was able to get a very powerful strain on his outfit between the *chock* and the *foremast*. Doubtless the appearance of his tackles when this occurred has furnished the ground for many of the assertions of his witnesses that he had a big strain on the anchor,—because the *tackles* were tight. Capt. Macaulay says he *did* have a big strain then,—but it was on the *chock* (Tr., pp. 2291, 2435-6, 2629; and see Henry, Tr., p. 238). Upon Capt. Macaulay discovering the shackle stuck in the chock a capstan bar was used by him to pry it through, and this done, the shackle leaped through (Tr., pp. 2291, 2436), allowing all of Miller's tackles to drop to the deck, and there was the *second* "drop" of Miller's tackles to

the deck. Henry says, too, that Miller's *wire* didn't come on board (Tr., p. 236), until after 12 o'clock (Tr., p. 238). Then it came with a rush when the shackle was helped through the chock. By that time the Ship was practically afloat, or in any case coming off so rapidly that it was out of the question for Miller to attempt anything but get his shackle off and cast his line off the Ship (Tr., pp. 2436, 2630).

But even as to the time when he did have some kind of a strain on the anchor line, which probably helped the Ship make its first movement, we submit that the strain was rather inconsiderable because of the limitations on his power.

In the first place he was using new lines which were large and stiff (Tr., pp. 959, 1151), and which, even when made smaller and more flexible by stretching, nevertheless required a considerable amount of power merely to run them through the blocks. The boy who has gone to his father's barn and tried to haul apart the ordinary two-sheave blocks of the hay-mow tackle, lying along the barn floor without a weight, knows it requires considerable power to do so, even if with the small ropes. On this Ship, it took several husky stevedores to drag the blocks and fleet the second luff tackle expeditiously, some of whom would be hauling the block aft and others hauling on the lines to assist them through the sheaves (Tr., pp. 1153, 1337). If that much power was required for an operation amounting only to running the loose ropes through the pair of two-sheave blocks, it would doubtless have taken *more*

power to fleet the first luff (or middle) tackle, which were three-sheave blocks, and as much or more again to move the ropes through the main tackle blocks, also three-sheave (Tr., p. 893). All this is aside from any exertion of *strain* on the anchor line itself, for we are speaking here of the mere power used up in overcoming the friction of the blocks and ropes themselves. Say that it would take a dozen men to overcome the resistance of the entire tackle equipment. The power which Miller had to operate his tackles was ordinarily the Ship's capstan or the Ship's winch. It is in evidence that he used the Ship's winch in preference to the capstan every time he could, which was at intervals when it was not in use for working cargo (Tr., pp. 1603, 1662). No logical conclusion can be drawn from this, taking the testimony on the point as a whole, except that Miller considered the Ship's winch furnished more power and was more rapid than the capstan. In the forepart of this brief, under the head of Lightering Operations by the Inter-Island Company, we have particularly indicated the extreme weakness of this winch, it being unable to lift over one-half a ton. It would appear to us that the power of the winch would, therefore, come very nearly being used up in overcoming the friction in the tackles alone, leaving comparatively little to be transmitted in useful strain to the anchor line.

As to the strength of Miller's anchor line: although he had a 2½-inch wire, it fell short of reaching the Ship, and was lengthened by an 8-inch (Tr., p. 2242),

or 10-inch (Tr., p. 2997), Manila hawser (Tr., p. 2246), a connection being made by a shackle of the kind drawn by Capt. Macaulay on one corner of Exhibit F (Tr., p. 2433). Now the weakest point in Miller's line wasn't his Manila hawser; it was his small $\frac{3}{4}$ -inch wire which he claims was used to reinforce the manila, and he considers it added the strength of *two* $\frac{3}{4}$ -inch wires because it was run double. The breaking strain of a single $\frac{3}{4}$ -inch wire is 12.3 tons (Tr., p. 2998). But it cannot be said that there was the strength of two wires in operation, because one end of the wire was taken from the Ship out to the shackle and there run through the eye of the shackle, and the end then hauled back on board by a line, causing the wire to run through the eye of the shackle until the first end was back on board, whereupon both ends of the wire were made fast on board (Tr., pp. 2288, 2998), the whole operation amounting to threading the eye of the shackle with the wire (Henry, pp. 236-8). Captains Haglund and Macaulay say that the real purpose of the wire was to serve as a "preventer" to hold the wire cable from slipping off into the sea in case the manila should break. Under these conditions the Miller line was no stronger than its weak part, the one thickness at the shackle.

As to the Miller anchor, although it has generally been referred to as weighing 7 tons, Miller really did not know (Tr., p. 1667); and in the bill of sale of the anchor to Miller it is rated as a "10,000 lb." anchor (Tr., pp. 3344, 1667-8, 1533), or 5 tons.

For a comparison of the holding powers of the Miller anchor as against the anchors of the Helene, as an aid to the vessel, we refer to our presentation of Capt. Haglund's evidence in the forepart of this brief. Possibly, if the Miller anchor wire were heavy enough or slack enough to lie flat upon and run along the bottom of the sea for some distance from the anchor before rising toward the stern of the Ship, the matter of comparison of angles between the Miller and Helene anchors would become of less importance than the comparative weights. We have already in this brief (page 84), shown that the total weight of the Helene anchors and anchor chains was 11.6 tons. Miller's wire could not have weighed anything near as much as the Helene's anchor chain per fathom, but even allowing them to have been *equal* weight per fathom (but it would really not be half), he had out 636 feet of wire plus 40 feet of Manila, equal to about one-third of the total length of chains forward of the Helene. One-third of the weight of the Helene's anchor chains would be about 6,200 pounds,—say 3.1 tons, added to a 5-ton anchor would make 8.1 tons, 3.5 tons less than the Helene's anchor and chain weight. The Helene had, besides, the effective or useful thrust of her propellers, which was 3.11 tons (tied), and also her 45 horse-power steam winch used in heaving on her anchor chains; and even yet there was the additional strain on the Helene's line imparted by her moving in the swell, and practically adding her weight to her pull.

Therefore, as a salving factor, Miller's outfit was far inferior to that of the Helene alone. And in addition to the mere limitations upon the power of his outfit, he didn't bring it up even to those limitations. His lines were not as taut as they *could* have been made; in fact it was far from being taut. Piltz frequently stepped over them (Tr., pp. 1799-1802, 2732-5) at a point where they should have been at least four feet or more above the main deck by any scale drawing of the situation. See Tr., pp. 2042-4, 2073-77, 2496. His lines were *not* held down by the Arcona line, because the Arcona line passed *under* (Tr., pp. 2733, 3153). Ordinarily his line was not tight. It went down into the water 30 or 40 feet from the stern (Tr. p. 2683) from the time it got dark and while the searchlight was on (Tr., p. 2683).

His best strain that night was on the chock at a time when even the weight of his anchor line was taken off his tackles.

The photograph, Exhibit L, shows Miller's line in the only position Tullett ever saw it in (Tr., pp. 2700-2).

With respect to the value of the vessels and equipment of the Miller Salvage Company in its operations at the Ship as a factor bearing upon any salvage award that may be given the Miller Salvage Company, we think the evidence speaks largely for itself; but we will suggest to the Court that the Mokolii was 30 years old, and cost Miller \$350 (Tr. pp. 1488-9); that the

Kaimiloa was 65 or 70 years old (Tr., p. 1488); that the Concord was 28 or 30 years old (Tr., p. 1488) and cost Miller \$850 (Tr., p. 1490); that his windlass cost him \$105 (Tr., pp. 3314, 3319), and his anchor cost him \$650 (Tr., p. 1532). A comparison of the values placed by Miller upon his vessels and equipment (see Tr., pp. 1417-24, 1491-2, etc.) with his tax returns will be interesting (see Tr., pp. 1485-6, 1492-3).

It appears that Miller had a surplusage of men at the Ship—at times, at least. In one place in the testimony it is said that he couldn't use a number of them, but they had to remain on the Ship because there was no way to send them ashore (Tr., pp. 619-21).

No assistance from the Ship:

Weight should be given to the fact that the work of salving the Ship was done with *no assistance from the Ship*. We may gather from the testimony here and there that Captain Henry gave orders occasionally, but it appears that he leaned pretty well on Captain Macaulay's advice in coming to decisions of what ought to be done. Aside from this it does not seem that the salvors had any aid from the officers or crew of the Ship. Had the captain of the Ship been cautious in his approach on Sunday evening or manifested ordinary sagacity with his vessel it is extremely unlikely that his ship would have been stranded.

From the testimony of Captain Macaulay, a pilot who knew every variation, tendency and caprice of the sea and elements in the vicinity of Honolulu harbor,

his very first word to the Ship was one of warning that the Ship was too close in (Tr., p. 2176), and his next thought was to get her out of it, for which purpose he advised taking in sail immediately and otherwise maneuvering the vessel to get her away from her proximity to the reef, and when this advice was not acted on, and getting away was apparently out of the question, he endeavored to have her anchored quickly. But in none of these things did he receive encouragement or cooperation.

In the first place, Captain Henry was a total stranger to Hawaiian waters (Henry, Tr., p. 151), but came boldly up and afterwards as a witness claimed that he was sufficiently acquainted with the conditions as he had his charts (Henry, Tr., p. 151) and his "book of directions" (Tr., p. 151). When Macaulay advised wearing the Ship to get her out, Henry thought he knew his Ship better than Macaulay—there would be "no trouble at all" in taking in his sails and bringing his ship to anchor (Tr., p. 2177). Macaulay advised or ordered the jibs down, "but they were not hauled down" (Tr., p. 2178). He ordered the starboard anchor let go; "It wasn't let go" (Tr., p. 2178), with no explanation why not until after the third hail and declaration of the consequences imminent, when the explanation was that the starboard anchor was jammed (Tr., p. 2179). They didn't use their own sense to think they had more than one anchor. They didn't take down the fore topsail until too late (Tr., p. 2179). By Henry's own tes-

timony he still had six topsails set when the Ship first struck the reef (Tr., pp. 163-4). He said further that he took these in within a quarter of an hour afterwards (Tr., p. 164), but McAllister says that when he came up on Monday morning her square sails were set (McAllister, Tr., pp. 98-99). Henry would have taken Miller's line from the first position of the anchor had Macaulay not advised against it (Tr., p. 2232). On board the Ship, besides the captain, was a crew of 25 men and the officers (Henry, Tr., p. 148), but there is little evidence of their assisting anywhere. On the last night Captain Haglund didn't see Henry in evidence at any particular time (Tr., p. 3045). Lonche said of Henry, "he was most of the time down below. His *mate* did more than anybody else" (Tr., p. 490). Lowry was *mate*, and on that night *he* went down to sleep at 10 o'clock and slept until 11:30 (Lowry, Tr., pp. 274-5), when he came on deck and immediately went forward (Tr., p. 315), without even looking around to see any lines or know what was the condition of things, and from 11:30 on he remained on the forecandle (Tr., pp. 274-5). Brisco was second officer. He didn't overlook his "tea", after which he "knocked around the deck" * * * walking around watching them discharge" (Brisco Tr., p. 332). Sorenson, the Ship's carpenter, quit working at six that evening (Tr., p. 356). Neither did Gordon work after six (Tr., p. 359), and he was underneath the break of the poop from eleven o'clock until the Ship came off (Tr., p. 359). The two apprentices were "having a sleep"

(Brisco, p. 338). Nowhere does it appear where the Ship's crew were. They haven't been referred to even as spectators. In short, the whole credit of the salving belongs to the salvors—none to the Ship.

Success:

The Ship and Cargo Were Saved Without Material Injury.

Aside from some "deck damage," consisting of poop rails and wharfing chock broken, and a big dent in the mizzen mast (Henry, Tr., pp. 144-5), and some boat davits bent (Tr., p. 145), and a very slight damage to the ship's bottom in the way of dented plates (Tr. p. 145), the Ship sustained no injury, and after repair of her mizzen mast was able to leave port.

The only damage to the cargo was from some of the fertilizer bags being broken and some of the contents lost on the deck by being wet and some reduced in value by a little of the several kinds being mixed by breaking of bags (Henry, Tr., p. 145; Watkins, p. 1202). The claim for damage to cargo was appraised at \$1,441. (Watkins, Tr., p. 1204).

As between the various agencies having part in the operations at the Celtic Chief, the inquiry of this Court will be to find, upon all of the evidence in the case, which of the several agencies were really responsible for the salvage of the Ship, and in what relative proportions.

When it is found that one witness, connected with or in the employ of one of the salving agencies, says one

thing, and is contradicted by another in the employ of another of the agencies, or by the interested officers of the Ship; and when we look for a witness who had no connection with or interest in any one of the salving agencies against the others, the search will narrow down to but one, Captain J. R. Macaulay, who is at the same time better qualified, perhaps, than any other witness who could be found, to give opinions in matters of sea knowledge, sea experience, salving, and who has a thorough knowledge of all the conditions and elements to which any reference has been made in the trial of this case. Of Captain Macaulay's qualifications, it appears in this case: That his age was then 57 years; that he has been a Honolulu Government pilot for eighteen and one-half years; that he has had forty-two years experience at sea; that he has been a master of both steam and sail for twenty-seven years (Tr., p. 2166); that he has had considerable salvage experience (Tr., pp. 2167, 2168-9, 2169-71), and the *Chiusa Maru* was ashore on this very same reef; that he is familiar with lines, cables and tensile strengths (Tr., pp. 2171-2), and ground tackles (Tr., p. 2173); that he is acting agent and surveyor-general of the American Bureau of Shipping, New York, and also acting for the Bureau Veritas, Paris; and holds diplomas from both of these bureaus (Tr., p. 2208).

For an unprejudiced opinion, apart from possible jealousies, we thing the Court may safely turn to the testimony of Captain Macaulay, who "had a thought to every little move" which might assist the Ship (Tr., pp. 2259-60), and who was a constant observer of the

operations from first to last, and knew also the conditions before any assistance arrived, and whose whole attention during the operations was continuously given to getting the *most* out of every form or possibility of assistance which are presented or could be devised, even to assenting to and approving the displacement of one salvor in the hope (which proved a vain one) that the substitution of a larger vessel would help the ship more materially. Differences in testimony of other witnesses on any given point may well be settled by reference to what Macaulay has said concerning it. We think that his opinion, expressed on page 2622 of the testimony, is comprehensive, fair to all, and may be accepted with confidence by the Court. We here quote it in full:

“To the best of my knowledge and belief, I consider that the salving of the Celtic Chief was due to the assistance rendered her by the Inter-Island Steam Navigation Company in lightering the cargo and in towing the ship, also partly due to the tug Intrepid and Young Brothers’ gasoline launch in holding the ship in position until such time as the Inter-Island Steam Navigation Company took hold, and I also believe that the salvage of the Celtic Chief was partly due to the Miller Salvage Company, whereby they lightered and laid a sea anchor with a powerful purchase and gave material aid in floating the vessel, and I will also state that I believe by a rise in tide that the rise in tide greatly helped the floating of the Celtic Chief, and all those combined were, to the

best of my knowledge and belief, the cause directly to the rescue of the vessel and cargo.”

Captain Haglund, unquestionably next in experience in the Island waters, and doubtless *most* experienced in matters relating particularly to inter-island steamship work, follows with his opinion, which, as he could not speak of his own knowledge concerning the *Intrepid*, was confined to the closer question of what took the Ship off the reef. He said:

“To the power that was exerted by the Inter-Island Steamship Company’s steamers, the lightering of the cargo out of the Ship by the Miller Salvage Company, as well as the Inter-Island Steamship Company, and the amount of strain, whatever that would be, that was put on the Miller anchor. It was an additional help.” (Tr., p. 3014.)

As to the proportion of aid rendered by the Miller anchor, he said further: “It would not be more than any of the Inter-Island steamers individually were exerting on the *Celtic Chief*.” (Tr., p. 3015.) And of the *Likeline*, the smallest of the Inter-Island steamers, he said she had a “bigger strain on her than they exerted on the Miller Salvage Company’s line.” (Tr., p. 3157.)

CREDIBILITY OF WITNESSES.

On account of the fact that credibility of witnesses is often an important phase for consideration on an appeal from findings of fact by the trial court, we trust that a slight extension of our brief, already too

long, will perhaps be of value to the Court on the subject.

Captain Schroeder.

We cannot avoid noting the vague generalities in the testimony of this witness; and the frequent inaccuracy of many of these, besides positive error in others. Details have rarely been given by him, and it seems to us that in most instances where he has been forced by the cross-examination to give details as to how or why he knew of some point, his previous testimony has not been sustained by evidence of his own knowledge, or it has appeared that he had drawn a conclusion, which he had assumed to state as though a fact known to him. This once apparent, the suspicion of unreliability attaches to his whole testimony, and this is not removed merely because on some points he is correct. That some of his errors are on inconsequential points should make no difference. Too often he has made unqualified statements of things as *facts*, when it is clear he had himself merely drawn a mistaken conclusion. For example:

We know, as a fact, that the anchor and line put out astern of the Ship was the work of the Miller Salvage Company. But Captain Schroeder, having in mind that he had advised Captain Henry to put out an anchor astern, and later seeing work of that kind going on, *assumed* and said, with no qualification or uncertainty of any kind, that "*the ship's crew* was engaged in connecting the ship with a weight or anchor

lying behind the stern of the Ship." (Tr., p. 385.) He apparently had no suspicion that the Miller Salvage Company was represented there at all, as, in answer to Direct 33 as to what other agencies than the Arcona were attempting to render assistance (from first to last of the operations), his answer was, "There were three little steamers" (Tr., p. 388). See also Tr., p. 395.

Twice he gave the hour of floating of the Celtic Chief as 11:30 o'clock that night (Tr., pp. 383, 399). Clearly he was mistaken as to the time, by the overwhelming weight of the other testimony.

Asked what advice, if any, he offered the Ship, he said that he gave the advice to lighten the Ship and put out an anchor (Tr., pp. 385, 391), and he failed altogether to mention that he also offered advice which was rejected as absurd and perilous to the Ship—that a line should be run to the Ship's bow and the Ship slewed around broadside as a means of getting her off. (See Haglund, Tr., p. 2925; Macaulay, p. 2328).

Again, we doubt very much whether Captain Henry ever told him that the Ship's floating draft was 24 feet aft and 20 feet forward (See Direct 11 (Tr., p. 384) and I. I. S. N. Cross 9 (Tr., p. 391),) because Captain Henry himself testified positively to her draft as being 21 feet aft and 20 feet 10 inches forward, which fact he knew when he left Hamburg (Tr., p. 251).

Again: his answers to direct interrogatories 10 (Tr., pp. 382-3), 24 (Tr., p. 386) and 27 (Tr., p. 387), gloss over with remarkable indifference the real facts of how

those operations were conducted, and what they attempted and failed in, and how they spent all the time from 12 o'clock until six or later in merely trying to get lines *connected in position for* pulling. We have nothing from Captain Schroeder of his anchor being first badly placed, or of the manila rope breaking, or the Arcona drifting too close to the Helene, or of the several hours spent that afternoon in a futile attempt to run a large wire on board.

Lieutenant Conneman:

The witness' testimony is equally devoid of the particulars as to the afternoon's endeavors on the part of the Arcona, and how they occupied the time *between* the times when the lines were "fast" (Tr., pp. 419-422);—although he was asked to tell *what was done*.

Captain Henry:

Captain Henry's testimony, taken as a whole, shows a very pronounced leaning toward a choosing of the least favorable times to tell of the work of the Inter-Island Company, and the most favorable when it comes to Arcona operations. Nowhere is there any concession of merit or appreciation of anything except as to the Arcona. The record abounds with indicia of his prejudice and efforts to belittle every effort that might mean cost for salvage. He characterized the service of the Likelike in taking the Ship after being arbitrarily cast off by the Arcona, far at sea in the dead of night, as "usual towage" service. (Tr., p. 142.)

He says he "tested" the various lines,—although he could not have tested the lines of the Mikahala or Like-

like. He did not "test" any of the *Arcona lines*. (Tr., p. 258.)

He could not testify positively about the bights in the *Arcona lines* (Tr., p. 245), but nevertheless said the lines were straight out of the water.

He failed to tell about the *Arcona's failures* when he was testifying on pages 186-9.

He said what he knew was untrue—or should have known it—that the Ship did not move farther on the reef (Tr., pp. 135, 165, 226).

He pretended he knew all that was necessary to know of these waters, having a chart and a book of directions (Tr., p. 151).

When he didn't want to answer he would frequently resort to the phrase "I cannot say" (Tr., pp. 157, 181, 182, 183, 188, 194, 192).

Clear evasion is shown on pages 162-3, 174-5, 180-3, 186,8, 194,5.

He didn't want to draw a diagram (Tr., p. 174).

He was not frank: when he said that "at times" there was no swell at all (Tr., p. 163). This is as true of the facts as to say that at times there were no waves—because *between* waves or swells there are none at all.

He was not frank: when he said that he saw the whole length of both *Arcona lines* (Tr., pp. 186, 218), when the inquiry was as to their condition *as lines*. Nor when he said he didn't know why the Ship bumped (Tr., p. 227), nor in his answers on pages 204-5 regarding bumping; nor when he evaded telling the distance between the *Arcona* and the Ship (Tr., pp. 193-5);

nor when he told only a small part of the truth of how the Arcona went far to sea with the Ship (Tr., p. 199), and why the Arcona would not tow the Ship back to anchorage (Tr., p. 199).

He was strangely averse to assisting in any exhibition of his Ship's papers (Tr., p. 299)—not that he had anything to conceal, but as showing his frame of mind as respects the other side of the suit.

He was not frank, when he claimed that they did use two falls on the Ship's winch (Tr., pp. 157, 159). They did, but only one at a time. He was not frank in telling of the Arcona and Intrepid (Tr., pp. 181-3, 163).

Captain Macaulay:

Aside from the question of the qualifications of this witness, already referred to, Capt. Macaulay was not disposed to give opinions and pass judgment on matters concerning which he lacked information or felt incompetent. He would not assume to tell how long it would have taken the Ship to have gone broadside but for assistance (Tr., pp. 2211-12, 2215).

Capt. Henry had such faith in Capt. Macaulay that he followed his suggestions, and did it even blindly in the case of the Miller line thrown over the rail on Tuesday night. Henry threw it overboard and learned why afterwards (Tr., pp. 2234-6). He would not state the size of the shackle on Miller's line (Tr., pp. 2434, 2626-9).

Counsel may argue that he was wrong in some matters in point of *time*. His uncertainty in matters of

time was repeatedly expressed by him (Tr., pp. 2230, 2238, 2300, 2327, 2504-5).

He would not be sure of the Helene's second anchor (Tr., pp. 2228-9).

If it be argued that Macaulay erred in having taken up the Ship's anchor Sunday night (Tr., pp. 2363-4), the answer is that a breeze came up that offered to get the Ship off from where she was only lightly touching and not *on*.

If it be claimed that he should have sent a boat ashore that night for assistance (Tr., pp. 2362-8, 2371), the answer is sufficient that they burned blue lights, before an open view of the town, and it was most singular that they were not noticed. Anyone would have been justified in thinking that action sufficient to bring help as soon as it could be reported.

Capt. Macaulay was well regarded as a witness in the Chiusa Maru case (3 U. S. Dist. Ct. Rep., p. 368).

Dick Clarke:

Not to be relied upon. See his testimony that he saw the Mauna Kea break her line: first on Wednesday when he was rigging the Miller tackle (Tr., pp. 1072-3)—(which was rigged on Wednesday); then it was Monday (when no Miller tackle was rigged); then it was Wednesday (when the Mauna Kea wasn't there). See pages 1072-9, 1135, 1137-8.

Haglund:

Age 57; grew up at sea; salvage experience (Tr., pp. 2886-8): Gave close attention to all the lines; a hard man to keep the run of that night (Tr., p. 2513).

Piltz:

Considering the fact that this man is a South Sea Islander and had no education (Tr., p. 2055); didn't know the word "physics" (Tr., pp. 2055-6); "not a college graduate" (Tr., p. 1849); was aged only 29 years (Tr., p. 1758) and yet held master's papers for sail at 25½ years and for steam at 27 years (Tr., p. 1758); and has had ten years' experience in Hawaiian waters (Tr., p. 1759) and some salvage experience (Tr., p. 1759), and that he declined to testify about things he wasn't sure of (Tr., pp. 1795, 2030-1, 2043-4, 2069, 2076-7),—we submit that his patience under the constant efforts to confuse him and entangle his statements, and his modesty as to his position in the operations (Tr., p. 2070),—not *in charge*, like nearly every Miller witness,—show him a witness entitled to very great credit.

Miller: Enough has been said.

AMOUNT OF AWARD.

The evidence on many of the issues of fact was conflicting, and while it is the province of this Court to re-examine the evidence throughout, it is submitted that the findings of fact by the trial judge are entitled to very great weight. We have thus far presented the case upon the facts, and submit that the findings of the trial court are in the main well sustained by the evidence.

Discussing, then, the amount of the aggregate award, we wish to point first to the fact that fully three and one-half years have elapsed since the salving, and that

interest for this period has been taken into consideration by the trial judge and is covered by the award at the rate of 6%, it being specifically indicated that this interest covers the difference between $17\frac{1}{2}\%$ (correctly $18\frac{1}{2}\%$) of the value of the property salvaged and \$30,000, i. e., \$5,220. As $18\frac{1}{2}\%$ of the salvaged value (\$134,599) amounts to \$24,860, we have thus the *real salvage award* as at the time of the salvaging.

It is submitted that $18\frac{1}{2}$ per cent of the salvaged value is not excessive and should not be disturbed. The circumstances might well have warranted more.

The claim that the salvors in this case should be compensated on a lightering and towage basis is wholly untenable. It is preposterous as a bare business suggestion.

The Inter-Island Company are distinctly *not* in the towing business nor in the lightering business; they are common carriers, and their vessels are not *tugs* looking for towing but are *freight and passenger steamers* which have regular schedules on which they operate in the inter-island trade, the very regularity of which is an important element of value to the company because every irregularity necessarily affects to some extent the convenience of the traveling and commercial public, and as necessarily entails some loss to the company. The Mauna Kea contributed a day out of her regular work, and which time would otherwise have been used to load her *freight* for her regular trip. She left only in time to take mail and passengers. It needs no specific evidence and no argument to show that her regular trade was seriously interrupted. It needs none

to conclude that the interruption caused loss to her owner, the Inter-Island Company. The same holds good for each and every vessel of the Inter-Island Company at the Celtic Chief. Abandonment of their regular runs amounted practically to deviation. It is perfectly safe to say that if the Inter-Island Company, or any company engaged in business as a common carrier of freight and passengers, were asked that its vessels, singly or collectively, should temporarily suspend regular business and come out merely to *tow* on any object, afloat or ashore, including even a stranded vessel, or perform lightering operations, on the understanding or suggestion that it would be regarded as a towing or lightering service and that compensation would be made on such a basis, it would not for a moment be considered as common business. There would be *no inducement*. The Inter-Island Company, in having voluntarily gone to the relief of the distressed vessel, and in having done it instantly, ready to take risks, and taking them, going with its vessels into a place where a master would imperil his license if he dared go there under ordinary conditions, to the abandonment of its own interests and business and the detriment of the public interest in the regular operation of common carrier vessels, did so on no towing or lightering basis. It did so on no conception that its vessels would be classed as "tugs" which have found employment. Its offer of relief was eagerly accepted,—the Ship's captain said he "wanted all the help he could get." Mr. Kennedy did not talk terms nor were terms suggested. Neither in the case of the Inter-Island or Intrepid was there any

employment; the case shows a mutual abandonment of the point of compensation to later agreement or adjustment, each presumably being conscious that it could ultimately be settled in a court of salvage if not otherwise. To this ultimate adjustment the case has come. It is submitted that this Court will apply to the case *such principles, based on the circumstances shown by the evidence, as will encourage rather than discourage relief of stranded vessels.*

It is argued that this particular vessel was in no particular danger and *therefore* the service was mere towing and lightering. We ask, did the parties so regard it at the time? Did it *promise* at the time to be only a case of time and labor? Was the item of danger to the Ship and cargo not at all in their minds? Was it not a *fear*, and a very grave one at the least, that she *might be lost if not gotten off quickly*? Is not promptitude to *prevent* danger or injury one of the prime factors of merit in salvage?

Salvage is not to be gauged or rewarded in the light of subsequent events but in view of the facts which seem to surround it at the time. See the case of *The Lowthier Castle*, 195 Fed. Rep. 604, and the many cases there cited,—which case is also instructive on the point of the distinction between “towage” and “salvage” service. If the standard for fixing compensation for assistance is to be determined largely by “*quantum meruit*,” or from the standpoint of *business*, after the dangers have passed or later appear to have been possible only, or that possible storms did *not* arise, then is not the danger great that owners of vessels may say,

to an inquiry for "towage" on a stranded ship, "Oh, yes, I'll help you as soon as I can, of course, but if, as you say, you are in no danger just now, I can't afford to go out right away—just you wait until next week; you may be going farther in, but then you say also you are resting easily in a nice comfortable bed of "soft" coral, and you aren't leaking just yet, and no storm hangs over you today, and my vessels are busy just now, and you only want to pay for towing and lightering, or will claim that's all I should be paid for anyway."

The purpose of salvage would not be served unless persons able so to do will feel encouraged to cast aside personal interest and go *at once* to the relief of distressed vessels, and render strenuous and unremitting service, in the confidence that they will get a square deal and a fair reward.

It must not be that services for the benefit of vessels in distress, are to become viewed with disfavor because of fear that they will not *pay*, until owners of vessels will hesitate to engage in such questionable ventures and risk loss, and which may come to mean, as of course, that a libel must be filed, and the burden of proof borne every step of the way, with an appeal to be contemplated whatever the award, and the almost even chance of ultimate positive loss as a net result of the litigation, expense, delay, harrassment of the trial (including time of witnesses taken from service on board to go to court), and actual immediate loss by cash outlay and loss and damage of materials, etc., besides the initial and subsequent prejudice to regular

business—all to be suffered and even expected as usually incident to an undertaking of salvage.

As to citations of particular cases of salvage awards, as a guide to determine an award in any special case, we think the difficulty lies in the fact that the cases are usually different. Awards on a percentage basis have obtained, and again have been as frequently considered inapplicable. The books are full of cases showing awards from two or three per cent up to fifty.

In the interests of commerce and navigation salvage awards ought to go beyond mere payment for work and labor.

2 *Parsons on Shipping & Admiralty*, 292.

When *passenger steamers* engage in salvage service they should be favored, as it occasions interruption of carriage of passengers, freight and mail. *Ib.* 299. Also the case of *The Strathnevis*, 76 Fed. 867.

We cite also the cases:

The Thornley, 98 Fed. 735 (20%);

The Annie Leland, 1 Fed. Cas. No. 421, p. 978 (over 10%);

The Lyman M. Law, 122 Fed. 816 (33⅓%);

The Howard, Fed. Case No. 6,752a (25%);

Edith L. Allen, 122 Fed. 729 (27%);

The Ellen Hood, Fed. Case No. 4,377 (11%);

Spreckels v. Dunreggan, 1 Estee (Hawaii) 19 12.8%);

The Penobscot, 103 Fed. 205 (17%);

The Minnie E. Kelton, 181 Fed. 237 (16⅔%), although the danger was slight and the work unskillful;

The Fair Oaks, 205, Fed. 192 (15%);

The Henry B. Tilton, 214 Fed. 167 (35%).

Being in the position of having to prepare our brief without being able to see appellant's brief, or know his citations of cases, or argument—a situation which has confronted us throughout in presenting our case in this brief, which, otherwise, would doubtless be far shorter—we can do little more than discuss Libellee's citations heretofore made.

In the case at bar the services of the Matson tug and the Inter-Island steamers were volunteered and accepted. The service was not sought or engaged in any contractual sense, nor in the sense of an employment of them by the stranded vessel.

The Intrepid was not sought but went out immediately on seeing the ship ashore, and asked if assistance was wanted. The hasty discussion that took place as to "price" was not one for employment to *tow*, but was with respect to an understanding to "*tow us off*." As a bargain, had it been made, it would have meant no success, no pay. It was not a *quantum meruit* arrangement. It was not a hold-up. The spirit of McAllister was not one of greed; he went out to offer help and was only responding to Captain Henry's own attitude in discussing pay at all; Henry *asked* for an "offer." McAllister, not Henry, was the first to say "leave it and we will settle it ashore," and during the *whole time* he paused not an instant in bringing the tug into position to pass the line, and passed it, and began towing immediately.

Appellant has heretofore relied much on the case of the "*Hesper*" (18 Fed. 696), as one of parity, so much so as to make it clear that the case was a model for calculations of what was urged should be awarded to the Inter-Island Company in this case, on a basis of "towage and lighterage" to begin with, and being an allowance (in lieu of figures appearing in the case) of what was claimed would be fair to say the Inter-Island Company could have earned, net, on the value of their vessels engaged. For this the figure \$4,379.77 was submitted. As to this case we have to say: First, the towage and lighterage basis is not applicable; second, the calculations left the Inter-Island Company to pay its regular operating expenses of its vessels out of the "net" profits; and third, the arithmetic was faulty, as, if we were to follow the method used in the *Hesper* case, the award would be \$42,240 instead of \$4,379.77. These points we present as follows:

(a) "Towing and lightering" as a basis of award: In the case of the *Hesper* the salving agencies were a tug and a lighter, the combined value of which was \$35,000. The libellants were *in the towing business as a business*, and, in the words of the Court, "the libellants' tug *only went out when called upon and employed to do so*. The labor and skill furnished were of the ordinary kind, *such as libellants' boats were seeking as ordinary employment.*" (p. 699.) The Court considered that the libellants had there merely found employment in their regular business, employment for

which they were waiting, and without which they were idle.

(b) In the absence of evidence showing a basis of ordinary charges for towing and lightering or for the rental value of the Inter-Island vessels for the period of time covered by their services, it is not fair to assume that the allowance of the expenses plus a "liberal net earning" upon the value of the vessels engaged, would be a fair award. Allowance must be made for operating expenses. The Inter-Island Co.'s vessels cost a good deal to operate, whether on this service or in their regular service. The regular pay rolls of the crews, the fuel and supplies ordinarily consumed, the taxes and depreciation, the profit and loss account of the general business, the maintenance of all of the wharves, buildings, improvements, shops, machinery, office and shore employees of the business as a whole—and many items too numerous to mention, are all charged against the operating expenses of the Company, and, if the business is to pay, each vessel must earn not only its own operating expenses but a certain proportion of the general business expense of the Company before a dollar can be credited to "*net earnings*." If the assumption of a fixed per cent as *net earnings* has any meaning at all, it means earnings after expenses are paid. In this case we offered evidence only of the *extraordinary* and not the ordinary expenses of the Inter-Island Company in connection with the Celtic Chief. Ordinary expenses are assumed to be covered by the general award. These extra expenses cover the overtime wages

of men on the regular payroll, and wages of extra men employed, the money actually paid out, and the value of extra fuel and extra materials used, depreciated, lost or destroyed in the operations. These made the total of \$3,561.77 and were satisfactorily proved (3372).

(c) The case of the *Hesper* as a model for calculation: Even were we to pass the very material differences between the cases, the method used in the *Hesper* case, correctly applied to the case at bar, would show more material awards for the Inter-Island and Matson Companies.

In the *Hesper* case the Court considered that the tugs could be rated as able to earn as much as \$300 a *day*—and that, too, only on “*some days*” (694), and it was a *profit* (694) over expenses. As much was allowed for night work. The *Estelle* was engaged three days and one night (which the Court took as equivalent to four days) and the *Buckthorn* was engaged two days and one night (which the Court considered as equal to three days), or a total of seven days. Seven days at \$300 a day made \$2,100, which the Court considered should be doubled to make a fair basis for compensation in view of the nature of the services actually rendered by the salvors in that case, and therefore the award was \$4,200.

In the *Hesper* case, with \$35,000, as the combined value of the vessels, the Court’s allowance of \$300 was for one day—not one year—and that was a little short of 1% of their value.

The Intrepid is admitted as worth \$30,000. Reducing her 2½ days and two nights to "days" we would have 4½ days, or the use of \$135,000 for one day. Two per cent would be \$2,700, which, doubled, would make \$5,400.

The trial court found that the highest value the Inter-Island Company alone had at any one time was \$465,000, and the lowest \$240,000. An average of this ought to be fair, at \$352,000. Two per cent on this value would be \$7,040, the allowance for *one day*, not one year; and as there were three days and three nights (nights having been counted in the Hesper case as additional days) there would be six such "days." Even at three days (aside from nights) we would have \$21,120 for the Inter-Island. If we were to count also the three nights as days, as in the Hesper case, it would make \$42,240.

Therefore, even considering the original claims for salvage, the Inter-Island Co. \$35,000, and the Intrepid \$15,000, and considering also that the Intrepid doubtless saved the Ship in the first instance, and the fact that in the Hesper case the service although considered "of the lowest order" was rewarded by "double compensation on a basis of towage and lightering service," which basis applied to the case at bar, would thus allow \$21,120 (if not \$42,240), for the Inter-Island and \$5,400 for the Intrepid, how can it be held that the claims here were or are so exorbitant as to call for penalty of costs? There has been no showing of prejudice to the ship on account thereof.

When, in the *Manchuria* case (3 Hawaii, 150), the demand of the "Restorer" for salvage of \$300,000 was held "unwarrantable under the facts of the case," and costs were therefore only *divided* between the parties, the demand was *five times* the amount of the award; and the reason there given for the division of costs was that above quoted. In the case at bar, there seems to us ample evidence that the services rendered initially and immediately by the "Intrepid" were of very great value to the Ship and perhaps saved her from total loss, which, by all the evidence would have resulted *had* she once gotten broadside. The claim of the Inter-Island Company, originally for \$35,000, was not "unwarrantable" if, as we respectfully maintain upon the evidence, the Inter-Island Company was the principal salvor.

But the *Hesper* case is itself different from that of the Celtic Chief in other particulars: There the tug and lighter were applied for and employed; the bottom was sand; the value of the *Hesper* and cargo together was \$106,500; the value of the salving vessels only \$35,000; there was no peril to life or limb. In the case of the Celtic Chief there was volunteered service; the bottom was coral, not so "soft" that it does not make good building stone; the value of the Celtic Chief, cargo and freight was \$134,559; the value of the Inter-Island vessels averaged \$352,000; and the value of the *Intrepid* was \$30,000; and there *was* peril to life and limb as to the men manning the small boats.

In the "*Manchuria*" case, also heretofore cited by claimant, reported in 173 Fed. Rep. 28-46, the "Re-

storer" made a record clearly outlined by the Court as mercenary from start to finish,—the Court "took notice of the undisputed fact that the libellant was not a volunteer,"—her help was asked for, and answer delayed,—there was not even a tardy offer on her part,—upon written request for her services only did she * * * consent to render any assistance,—she would not even consent to get up steam without a guaranty for reimbursement for expense of so doing,—she kept a careful record of every thing of value in determining salvage,—etc.

Appellant sought to bring the present case under the terms of the "Manchuria" case based upon such attitude of the "Restorer," saying, in effect, that the Inter-Island Company were carefully preparing to sustain their exorbitant demand even before the ship was free, and seemed more interested in making a strong case for the Inter-Island than in aiding the unfortunate ship; and that their directors and their attorney were there to get evidence. All this seems to rest upon Mr. Lewis' assent to the question whether he had not gone out that night "as the attorney" of the Company, and his assent to the question of whether he was not thus there to "prepare himself for a possible suit" (Tr., p. 3233).

Mr. Kennedy's testimony cannot be read without it being seen that he had no such thought as gathering data for a suit. He "wasn't so much interested in lines" as he was "in seeing her move again" (Tr., p. 809). Taken as a whole his testimony sadly lacks the precision of times, distances, etc., that would be expected of a man

who went to "gather evidence." Mr. Dowsett "went out to the ship to see what was doing" (Tr., p. 2087). Mr. Lewis went there, being attorney for the Company, but even on his assent to the suggestion that he was there in that capacity, we submit it cannot be said that anything *he* could have seen or done that night could have affected the operations that were under way and which would have been the same with or without his knowledge, in which he had no part, and was neither asked for advice, offered none, and as only a *spectator*. It was not unnatural for him to have answered the question affirmatively, put as it was.

It has also been urged that the *Loch Garve* case furnishes the standard or control over the case at bar. The decision of the District Court is reported in 3 U. S. Dist. Court Hawaii, page 372, modified on appeal to this Court as reported in 182 Fed. Rep. 519. Let us compare the cases. Our page references will be to 182 Fed. Rep. unless otherwise indicated.

Values: Loch Garve, and cargo, etc., \$150,000 (Tr., p. 520); Celtic Chief, and cargo, etc., \$134,600.

Values of Libellants, aggregate: Loch Garve, \$430,000 (Tr., p. 520); Celtic Chief, \$565,000 (Tr., p. 3372); (Add Intrepid \$30,000 in each case).

Values of Libellants, pulling at time of success: Loch Garve, Likelike, \$100,000 (Tr., p. 3372); Intrepid (\$30,000) (Tr., p. 520, 3221). Total, \$130,000.

Celtic Chief, Inter-Island, \$240,000 (Tr., p. 3372); Intrepid, \$30,000 (Tr., p. 3221). Total, \$270,000.

Vessel ashore: Loch Garve, 128 feet, with bows lifted 2 feet 7 inches above floating draft (Tr., p. 520).

Celtic Chief, full length (this brief, p. 30), which was 266 feet (Tr., p. 3372), with her bow lifted 4.10 feet and her stern 2 feet above her floating draft, because she drew 20 feet 10 inches forward and 21 feet aft when she left Hamburg (Henry, Tr., p. 251), and by the testimony of Schroeder the depth of water "aft, amidships and in the forepart, 19, 18 and 16 feet of water respectively" (Tr., p. 384).

The Loch Garve would *float* far sooner.

The reef: Must have *been* "soft" in the Loch Garve case, as she was imbedded "to a depth varying from 1 foot 9 inches abaft amidships to 7 feet 6 inches off her forehatch," etc. (Tr., p. 520), while in the Celtic Chief case the reef was hard coral and rocks (see pages 7 and 18-19 of this brief), and her keel only, was imbedded, from 6 inches (Macaulay, Tr., p. 2345, 2389), to 8 or 12 inches (Miller, Tr., pp. 1618-19).

The Ship *would* have bilged on such a reef, once broadside.

In the Celtic Chief case, the Mauna Kea did not abandon, but let go only on passing her line to the Helene (Tr., pp. 2889, 2771-2), and saving "whatever good results she may have accomplished," while in the Loch Garve case the Mauna Loa was discounted because she failed to do so. (See 3 U. S. Dist. Ct. Haw. 378).

Weather and Sea:

Loch Garve: Although the weather was, on Wednesday night rainy with variable winds, it does not appear that this affected the vessel in the least, and this Court found that "the weather was good during Thursday and the sea smooth" (Tr., p. 524).

Celtic Chief: The swells affected the Ship and made the small boat lightering both difficult and dangerous. The state of the weather is reviewed on pages 8-10 of this brief, and the violent effect of the sea on the Ship, early in her stranding, is found by the Court (Tr., pp. 3370-1).

It has heretofore been urged by the Libellee that the claims of the salvors were "so exorbitant that they destroyed all chance of a settlement without litigation." This we deem a remarkable claim if it is to go outside of the record to intimate that no opportunity for a fair compromise was open to the Libellant before the *trial*, at least as far as the Inter-Island and Matson Companies are concerned. There is nothing *in* the record to justify the assertion. The trial court's opinion that the aggregate of all the claims, \$70,000, was excessive (Tr., p. 3375), is not, we submit, a fair basis for the penalty of costs therefore imposed upon all of the libellants, because it is not the fault of the Inter-Island Company, claiming as the principal salvor, that *another* libellant, the Miller Salvage Company, also so claiming, asks \$20,000. Why should the claims be added? No \$70,000 is claimed by the Inter-Island. Its claim, originally for \$35,000, but voluntarily reduced to \$25,-

000, should rather be considered from the standpoint of whether, were it the principal salvor,—as we submit the record shows was the fact,—the sum was too high, and justified such a penalty, when the trial court has itself found the salving of the vessel was *worth* \$30,000.

The claim of the Intrepid, originally for \$15,000, but reduced to \$10,000, is scarcely in a different position, for there is ample room in the case to say that it *cannot be said* that the work of the Intrepid, in the first vital hours, did not save the day.

It is respectfully submitted that the penalty of costs to *all* the salvors was not and is not merited.

Furthermore, as Miller's lightering was 246 long tons (Tr., p. 1201), which Watkins says was itself worth \$12,162 landed (Tr., p. 1202), and this was admittedly done by him under a lightering contract (Tr., p. 1667), his compensation on that part of his work should *not* be on a salvage but a contract basis. Eight thousand dollars was and is too much for him out of the entire award. More credit should be taken from him and given to the others. If we assume that his contract lightering resulted in landing \$12,161 worth of fertilizer, and he were allowed even 20 per cent of its value for his contract reward (this being even more than the salvage rate allowed by the trial court in this case), his compensation for *that* would be only \$2,432. Certainly the evidence in the case cannot warrant his being allowed \$5,568 *more* for the assistance of his anchor,—almost a *third* of the allowance for the Inter-Island for

lightering more cargo than he did, 365 long tons (Tr., p. 1203), by dangerous small boat work, and being the principal factor in saving the remaining 1,936 tons on board besides the spirits, marbles, and the Ship itself, the aggregate value of which, over the \$12,161 worth of cargo lightered by Miller, was \$122,438. Plainly, we submit, more belongs to the Inter-Island out of Miller's award of \$8,000. It would certainly be unfair, to *reduce* the awards actually made to the Inter-Island and Matson Companies, even if more cannot be allowed.

In the Loch Garve case this Court held that the Manning was mainly instrumental in floating the Ship, deeming that "whatever strain they (the Likelike and Intrepid), had no doubt contributed to that end" (Tr., pp. 524, 525), and *on that view* allowed the Inter-Island \$12,500 instead of the \$15,000 awarded by the lower court, and did not disturb the award of \$4,000 for the Intrepid.

In the Celtic Chief case the principal work was done by the Inter-Island Company, and the Intrepid, and the awards of \$17,500 and \$4000 are in fact too small by analogy.

In the Loch Garve case, the award to the Inter-Island Company was \$15,000 and costs. It was afterwards reduced to \$12,500 on the ground that the court below had not given sufficient credit to the work of the "Manning." The action of the appellate court amounted to a finding, not that the work would not have been worth the \$15,000 had the Inter-Island Company done

it all, but that, on that basis, part should have been credited to another agency. In the case at bar we submit that our arguments and the evidence show clearly that the "Arcona" cannot come in as a salving factor, to have "credit" set apart to it in reduction of the amount which the Inter-Island Company or Matson Navigation Company should receive.

Furthermore, let us look at the separate awards actually awarded by the trial court to the Intrepid and Inter-Island, aside from interest. The entire award of \$30,000 included interest in the sum of \$5,220. This interest is itself $17\frac{1}{2}\%$ of the \$30,000. Therefore, of the award of \$17,500 to the Inter-Island, $17\frac{1}{2}\%$, or \$3,062, goes for interest, leaving the actual *salvage* award \$14,438. Similarly, of the award of \$4,000 to the Intrepid, $17\frac{1}{2}\%$, or \$700, stands for interest, showing the actual *salvage* award as \$3,300.

As to the Inter-Island, \$14,488 is approximately $10\frac{3}{4}\%$ of the value salvaged.

As to the Intrepid, \$3,300 is a little less than $13\frac{1}{5}\%$ of the value salvaged.

Taking the Inter-Island \$14,488 and Intrepid \$3,300 together, or \$17,788, this would be $13\frac{1}{5}\%$ of the salvaged value.

As also affecting the amount of the award should be considered the fact of the Likelike's care of the Ship when cast off by the fearsome cruiser under the conditions heretofore shown, and the later mere towage serv-

ice by the "Maui" in taking the vessel into the harbor next morning,—all as yet uncompensated.

The separate allowance of the \$3,561.77, clearly proved and found by the Court to have been actual loss and outlay, should also stand. Such allowances have heretofore been made (see *The British Queen*, 89 Fed. Rep. 1002; *The Henry B. Tilton*, 214 Fed. 167; and *The Fair Oaks*, 205 Fed. 192, 195, where deposition expense and attorney's fee was allowed).

NOTES IN REPLY.

In order that some points may not be passed without notice, where we deem that corrections or comments should be made by way of reply to appellant's brief, we make the following supplement to our brief.

The Mauna Kea, not the Mikahala, was the first Inter-Island vessel to reach the Ship. In this counsel have, on page 6 of their brief, followed the clear error of the trial court appearing on Tr., p. 3352.

The time of the transfer of the line from the Mauna Kea to the Helene was 7 a. m., not 8 a. m. (Tr., pp. 2889, 2771-2); and here again the equally clear error of the trial court (Tr., p. 3353), has seemingly been merely followed by appellant (Brief, p. 6). There is *no* testimony which gives the Mauna Kea as arriving except at 6:30 or 7:00 a. m.; nor did the Mauna Kea leave until her line was transferred while pulling.

The Likelike came out, not at noon (Brief, p. 7), but in time to have her anchor laid and line passed by noon (Tr., p. 3354).

The suggestion of "salvage under legal advice" (Brief, p. 8), is not warranted, and the facts show that Lewis, Kennedy, Dowsett and Wilcox went out merely as spectators. Kennedy himself had understood that there had been a "program" for the Mikahala, but it was not within his own knowledge (Tr., p. 807). He said himself that he was not so much interested in lines then as in *seeing her move* again (Tr., p. 809). No more does it appear that Lewis knew anything of the plans, or that he ever opened his mouth except to comment on what he observed. Dowsett went to "see what was doing" (Tr., p. 2087). It is not likely that any of these men, if actively interested in the operations, would have gone to bed and asked only to be called later (Tr., pp. 761, 773, 2092, 3224). Merely being there to observe, does not affect what was independently done by others than the observers.

It would be more correct, as we contend, to say that the Arcona's *stern* was astern of the Ship, rather than that her *position* was astern (Brief, p. 10). Her *bow* was inclined eastward.

To the claim that the Inter-Island and Miller Salvage Company witnesses all "absolutely discredited all aid but their own" (Brief pp. 12-13), we think the same is quite as true of the witnesses from the cruiser. Henry did not hesitate to belittle practically all but the Arcona; and we do not regard the claimant as any less "interested" than the libellants, and as to the Arcona officers we think their depositions justify a belief that militarism or egotism, and clear scorn of the "three

little tugs," prevented their feeling "disinterested" on the point of who rendered the most effectual service.

Not only was the lightering effective to aid the Ship (Brief, p. 14), but the *holding* of her, while lightering.

Referring to the foot note on page 51 of Appellant's brief, we cite also the witness Mason's own admission, upon cross-examination, that he had not heard Macaulay say anything of the kind (Tr., pp. 940, 999).

Much of the force of Appellant's citations of cases: *The Howard* (Brief, p. 55); *Roberts vs. The St. James*, and *The Katie Collins* (Brief, p. 58); and *The Diadem* (Brief, p. 59), and also the argument of what "might well have happened" (Brief, pp. 60-61)—applies, we think, to the attitude of the Arcona in this case.

And the argument itself emphasizes the possibilities of danger in this case.

We refer now to appellant's brief, pages 61-64, and also pages 4 and 5, as to the service first rendered by the Intrepid; and point out that the Ship was then *touching* and was *not* hard aground, but, as found by the Court, was then "always moving gradually toward broadside" (Tr., p. 3352); and the quotation of testimony on page 62 of Appellant's brief should be supplemented by the testimony on Tr., pp. 2195-99.

Referring to Appellant's brief, page 64: The Intrepid was *not* dismissed, for Capt. Henry accepted McAllister's offer still to lay within hailing distance, to respond if wanted (Tr., pp. 86, 95-96).

To the point urged by the Appellant that the Intrepid's share of the award should be forfeited because

of the misconduct alleged, we reply that it is clear, even upon Appellant's own estimate of the alleged misconduct, that it was not any misconduct or fault on the part of the owners of the *Intrepid* but was wholly individual and personal on the part of the Master, McAllister. Misconduct of a master or crew, without fault on the part of the owner of a vessel which has rendered a real and substantial salvage service, does not work any forfeiture as against such owner. See the cases:

The Rising Sun, 20 Fed. Case No. 11,858;

The Mulhouse, 17 Fed. Case No. 9,910;

The Boston, 3 Fed. Case No. 1,673.

And the Court did penalize the Master of the *Intrepid* (Tr., p. 3373).

As respects both the *Intrepid* and the *Mauna Kea*, which were not engaged during the whole operations, it is submitted that they, having rendered valuable services which contributed to eventual success, are not in the class of salvors who have merely made unsuccessful efforts.

The Gov. Ames, 108 Fed. Rep. 969, 972;

The Flottbek, 112 Fed. Rep. 682, 685.

Appellant's cases (Brief, pp. 87, 66), cited to support the contrary claim, are not in point. The *Mauna Kea* did not leave except upon transferring her line to the *Helene*, as elsewhere shown.

May we say that the word "they" at the end of line 13 should be "it," and have for its antecedent only the Miller Company.

There being no evidence of what strain, if any whatever, was put on the Arcona anchor, the fact that the anchor "held fast" (Brief, p. 94), does not establish its holding power. The credit given by the Court to the Helene's holding power (referred to in Appellant's Brief, pp. 94-95), was mainly before the Arcona came out.

The argument that the Court should here consider, in any case, the services which the Arcona *could* have performed "*if necessary*" (Brief, p. 99), prompts the reply that her help was sought at first and her commander used his own judgment, against that of those requesting the aid, as to when it was "necessary."

We urge that not only should the awards to the Inter-Island and Matson Companies not be reduced but they should receive more, by a proportional readjustment and allowance to them of at least one-half of the \$8,000 award to the Miller Salvage Company; and, further, that the penalty of costs against these libellants should be remitted.

Respectfully submitted,

W. O. SMITH,
L. J. WARREN,
CHARLES P. EELLS,
W. H. ORRICK,

*Proctors for Inter-Island Steam Navigation
Company, Ltd., and Matson Navigation
Company.*

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE BRITISH SHIP "CELTIC CHIEF", her tackle,
etc., and JOHN HENRY, master and claimant
thereof,

Appellants,

vs.

INTER ISLAND STEAM NAVIGATION COMPANY, LIM-
ITED (an Hawaiian corporation), owner of the
steamers "Helene," "Mikahala," "Likelike,"
and "Mauna Kea," for itself, the officers and
crews of said steamers and other servants of
said owners,

Appellee,

THE BRITISH SHIP "CELTIC CHIEF", her tackle,
etc., and JOHN HENRY, master and claimant
thereof,

Appellants,

vs.

MILLER SALVAGE COMPANY, LIMITED
(a corporation),

Appellee,

and

THE BRITISH SHIP "CELTIC CHIEF", her tackle,
etc., and JOHN HENRY, master and claimant
thereof,

Appellants,

vs.

MATSON NAVIGATION COMPANY (a California cor-
poration), owner of the tug "Intrepid," for
itself and the officers and crew of said tug,

Appellee.

APPELLANTS' REPLY BRIEF.

Complaint is made in both briefs of the appellees that said briefs had to be written before the receipt of appellants' brief. Admitting this to be true, we call attention to the fact that our brief was served *in Honolulu* on October 31st, or 18 days before the argument, and considerably before this on the local proctors for the Inter Island and Matson companies. There was, therefore, *ample* opportunity to add to the briefs of appellees any reply that was deemed appropriate, and the Inter Island and Matson companies have taken advantage of this opportunity, though the Miller Salvage Co. has not. In order to be absolutely fair, however, we shall make no reply to the Miller brief and let that case stand as submitted on the original briefs.

The brief for the Inter Island and Matson companies, hereinafter called the appellees, does just the thing we endeavored to avoid—giving a detailed survey of the testimony on points wholly undisputed by us on this appeal, although accepting the lower court's findings. Counsel's industry is to be praised, but we submit that the court should not allow itself to be swamped by a consideration of details not in dispute. From reading his brief one would be apt to gather that, because so much testimony was taken on so many trivial points, the case was a very complicated one and called for a very high salvage award. We again reiterate, however, our contention that the case was a very simple one, and that a high award should not be given merely because the record contains 3419 pages of testimony (at least 2500 more than it ought to), and because counsel has seen fit to write a 236-page brief analyzing that testi-

mony. We shall not endeavor to follow counsel in his detailed analysis of the evidence, but will discuss very briefly a few of the points which he makes.

In opening we wish to correct a few unintentional misstatements of the facts by us. The testimony of appellants covered 385 pages and not 285 as stated by us. We were mistaken in saying that the "Mikahala" and not the "Mauna Kea" was the first Inter Island vessel to come out, but both came at about the same time, and the error was immaterial. We were also mistaken in saying that the "Mikahala" rather than the "Like-like" towed the steamer to an anchorage after she was cast off by the "Arcona". It is not fair, however, to insinuate that the "Arcona" would have cast the ship off if one of the Inter Island vessels had not agreed to take hold. She asked to be relieved and was relieved, and that is all there is to it (Henry, I, 199). We also may have been mistaken in leaving open the inference (justified by the court's decision) that the "Mauna Kea" left the ship before the "Helene" came out. It is true, as counsel says, that the "Helene" took the "Mauna Kea's" line, but the fact still remains that the "Helene" was not ready for pulling till 8 A. M. (brief of appellees, p. 79), or a considerable time after the "Mauna Kea" left. The two steamers were never pulling together, and it cannot fairly be said that they were both assisting in the operations at the same time, or that their values should be considered together while so doing.

All through the brief for appellees are numerous incorrect statements as to our contentions, as, for

instance, that we claim the "Arcona" did most of the salvage work, and that the "Celtic Chief" was not in danger, as well as other things too numerous to mention. It may be that these claims were made by other counsel in the lower court, but we do not make them here and, therefore, any arguments on such subjects should be largely disregarded.

Counsel discusses at great length in the opening part of appellees' brief the character of the reef on which the "Celtic Chief" grounded, the character of the swells during the operations, and the evidence as to how far and during what times the ship went further on the reef. Almost all of these matters are settled by the lower court's decision, and we decline to be drawn into a discussion of them. As regards the swells we still rest confidently on our brief statement in regard thereto in our opening brief. Despite the perils which the Inter Island witnesses were able to conjure up, the salient fact remains that not a single small boat was capsized and not a single man was injured. The wealth of detail accumulated on all these subjects in the trial court simply indicates how much useless testimony was taken as to trivial matters. If all salvage cases were tried as this one was our federal courts could hardly continue to do business. Having thus dealt, or declined to deal, with the opening observations in appellees' brief, we shall proceed to deal with their more specific contentions. Here again, however, we shall endeavor to avoid any detailed discussion and to take up only the broad salient features of the case.

THE CASE FOR THE "INTREPID".

We shall leave unanswered the argument as to the amount of strain on the "Intrepid's" line during the operations, accepting the findings of the court on this point. We cannot, however, pass over the expected reference to her alleged aid in changing the position of the "Celtic Chief" upon her arrival. Counsel says that Capt. Macauley's evidence on this subject is uncontradicted, wholly overlooking the fact that it is contradicted by both McAllister and Barret, the men who ought to know best, and we again say that probably the change from "position 2" to "position 3" was accomplished before the "Intrepid" took hold. Otherwise McAllister would hardly have said that the "Celtic Chief" was "right straight head on" to the reef when he arrived (I, 82). Counsel claims that this maneuver by the "Intrepid" "saved the day", yet McAllister and Barret clearly negative the idea that any such maneuver took place and claim no credit for it.

As to the action of the "Intrepid" in not making way for the "Arcona", the excuses are petty and invalid. Counsel asks *why* the "Arcona" had to have the position in question, and the answer is that it was because it was the best position and the "Arcona", being larger and more powerful than all the other vessels combined, was therefore entitled to the best position. The claim is also made that there was ample room for her elsewhere, yet on page 113 of appellees' brief it is argued that the Inter Island vessels would have been in grave danger if their lines broke, because the salving vessels were so close to each other, and

the danger of a collision between the "Mikahala" and "Arcona" is especially emphasized. Apart from this, however, it was the "Intrepid's" duty to make way when ordered to do so and not to undertake to weigh the pros and cons. The statement that Lowry was the only person to hail the "Intrepid", and only hailed her once, is met by our opening brief (p. 70) where the applicable evidence is referred to.

Counsel seems to object because Capt. Henry did not make good his offer to take the "Intrepid's" line from another position, but this was because the "Intrepid" *did not make way as requested*. Had she done so he certainly would have made good his offer. As it was, however, the "Intrepid's" disobedience forfeited her right to any further consideration.

In the supplement to appellees' brief (p. 234) it is claimed the "Intrepid" was *not* dismissed because McAllister's offer to lay within hailing distance was *accepted* by Capt. Henry. This is a most remarkable misconstruction of the testimony. Capt. Henry distinctly told McAllister that he did not require his further assistance (I, 86) and, on McAllister's further statement that he would lay there anyway within hailing distance, Henry replied, "All right" (I, 95-96) or, properly construed, "Do as you please, for all I care". Henry simply assented to what the "Intrepid" proposed to do; he could not have done anything else. The act of a salvor in "standing by" may be exceedingly meritorious in *some* cases (as in *The Amsterdam*, 7 Asp. 400, where the master let go when requested), but not,

we submit, where he has been dismissed for misconduct and told that his services are no longer required.

Appellees' final contention is that the misconduct of the "Intrepid's" master was individual and personal and should not be visited on her owners. The cases cited, however, are not in point, as *The Rising Sun* and *The Boston* deal with embezzlement of cargo, and *The Mulhouse* deals with the failure to properly care for cargo so that it was embezzled by others. While it is fair to say that where a vessel performs meritorious services her reward should not be forfeited by acts wholly outside such services, it cannot be said that the same is true of misconduct directly bearing on what *the vessel* does to earn salvage. As said in the case of *The Rising Sun*, the owners are not responsible for the acts of the master "unless they are expressly authorized or fall within the usual course of his employment". In this case it is expressly alleged in the "Intrepid's" libel "that one of the *principal* purposes of said maintenance of said tug in said harbor is that of rendering assistance to and salving vessels in distress in and about the waters of and immediately surrounding the Territory of Hawaii" (I, 47). In rendering such services, therefore, McAllister was clearly acting within the direct scope of his employment, and it was incumbent upon him to decide *for his owners* whether he would give up his position. On ordinary and familiar principles of agency his owners are bound by his act. If the "Intrepid" was justly dismissed, as is clearly the case, it seems hopeless to contend that she is entitled to salvage. The court will note that in many

We shall not go into the detailed and intricate discussion as to the value of the "Helene's" anchors or the comparison between them and the Miller anchor. We are surprised, however, to be told that an anchor attached to a vessel moving to and fro in a seaway can have the same effect for holding purposes as a fixed anchor directly connected with the stranded ship. Licensed wreckers, who operate mainly by means of anchors and cables, will have to look to their laurels if this new principle of physics be adopted. We submit that it is but another exaggeration of the case for the Inter Island Co.

The argument on pages 111-114 of appellees' brief in regard to the dangers to the Inter Island steamers is half hearted and far from convincing. The alleged dangers are those incident to all salvage services. The lower court has found that there was no material danger, and we have no doubt as to that finding being accepted.

THE "ARCONA".

As the trial court, after hearing a mass of contradictory evidence, made its findings as to what services the "Arcona" performed, the hopelessness of attacking such findings should have been as clear to our opponents as to us. Yet it has become the principal subject of appellees' brief, and we are glad that the court is thus given the opportunity of reading the testimony of the officers of the "Arcona" and the "Celtic Chief" on this subject, and to judge for itself whether the attacks on

their credibility are justified and whether their "militarism" or "egotism" prevented their telling the truth as they saw it. As we do not claim, however, that the "Arcona" was the principal factor in the operations, we shall discuss only a few phases of the subject. We shall also ask the court to judge whether appellees were justified in taking the vast amount of evidence which they did on this subject. The lower court taxed the costs against them because of their excessive claims. It could have even more appropriately done so because of the manner in which they incumbered the record on this and other matters.

We cannot let pass unchallenged the claim of appellees that the record shows what is equivalent to an utter absence of the "Arcona" as a salving agency. The "Arcona" was a German warship, and she did not go out till she did solely because other salvors were on the spot and their success was expected. If there had been no one else there it cannot be doubted for a moment but that the "Arcona" would have assisted. It cannot be said by appellees, therefore, that no other assistance than their own was available, and this is a very material factor in determining the amount of their award. Counsel speaks of the "Arcona" as "the fearsome cruiser", and wholly forgets that a ship of war rarely acts as a salvor and is not justified in subjecting herself to danger to meet the private ends of others, if there is a reasonable hope that the work in hand can be accomplished otherwise.

The claim that the coming of the "Arcona" prevented the pulling off of the ship on Wednesday noon

is wholly unjustified by the record, and we refuse to be drawn into any such conjectural discussion. We also shall not go into the facts as to the initial pulling by the "Arcona". The court has found the facts in this regard and we stand on those findings. It is also unnecessary for the same reason to discuss the final position of the "Arcona's" anchor. The evidence of Capt. Piltz is much relied on by appellees on this point (brief, pp. 166-167), but this evidence was discredited by the court (VIII, 3360).

Counsel claims that the lines of the cruiser were too small for towing purposes. If the court will examine the wire offered in evidence, which was $1\frac{1}{4}$ inches in diameter, and will even further accept counsel's statement that the wire used was only 1 inch in diameter, it will be readily apparent how powerful the wire was. The fact that the "Arcona's" first line broke is not necessarily evidence of its weakness for ordinary salvage purposes, but is rather evidence of the "Arcona's" great power. Men of war with 8200 horsepower are not generally engaged in salvage operations. We shall go but little further into the evidence as to the size of the wires used or the strain on them. The findings of the court are conclusive on this issue. Counsel would have it that the evidence of Capt. Schroeder and Lieut. Conneman as to the tautness of their lines was hearsay, but we do not think this court will so hold even on an examination of the quoted statements in appellees' brief. Capt. Haglund testified to having made a special trip in which he noted the slackness of the "Arcona's" lines, but, when counsel for the "Celtic

Chief'' tried to check him up on this evidence, he could not remember the name of a single man in the boat with him at the time (VIII, 3037). Capt. Macauley's testimony, quoted on page 151 of appellees' brief, is to the effect that only the bight of the "Arcona's" line was in the water, and that it touched in the middle, just as Capt. Nelson testified as to the lines of the "Helene", and just as every seaman knows lines will touch no matter how taut. Macauley's later evidence as to meaning that the middle of the line was *practically the whole line* may, we think, be safely discounted.

The claim that the "Arcona" did not use her propellers was admitted in the lower court and it is here again admitted, so counsel's elaborate citations on this point seem somewhat unnecessary. The claim that she did not heave on her anchor chain is met by the court's findings. The court credited the evidence of the "Arcona's" officers on this point as against the biased evidence of the Inter Island witnesses. As to the argument that, if she had heaved, she would have changed her position, this largely depends on where her anchor was placed. The lower court after "repeated reviews" of the evidence found that the "Arcona" did heave on her anchor chain (VIII, 3360, 3363).

Comment is made on the slacking of the "Arcona's" lines when the ship came off the reef, and the same comment is later made as to the Miller anchor. Both these agencies, however, might well have found it difficult to take in their slack fast enough to meet the ship's movement, especially as the "Arcona" was not using her propellers. The vital fact remains that the ship *came*

off in their direction. Counsel says that this was natural because the Inter Island steamers *balanced each other*. It would seem, however, that, if the "Helene" was doing the powerful work she claimed to be doing, she and the "Likelike" on one side of the ship would have far over-balanced the "Mikahala" on the other side. We believe that the lightering put the ship afloat or so nearly afloat that her moving was comparatively easy, just as the lower court said it did. We also believe that, with that result accomplished, it was either the "Arcona" or the Miller anchor that started the ship off. We do not believe that the Inter Island vessels assisted much except after she first started and the real work had been done.

There are many other animadversions against the "Arcona" besides those already noted. That most of them are unjust we firmly believe. We do not, however, intend to go at any more length into this highly immaterial matter, and we will let the further comments pass even at the risk of injustice being done to this German cruiser. If foreign salvors are attacked in the future as the "Arcona" has been attacked in this case there will be little likelihood of their contributing aid to other vessels similarly situated.

OPERATIONS OF THE MILLER SALVAGE CO.

Many apt comments are made on Miller's operations in this part of appellees' brief. The refusal of the Inter Island witnesses, however, to give any real tan-

gible credit to the Miller anchor, and their biased testimony to the effect that the wire was slack most of the time is another instance of how each salvor discredited all aid but his own. Their testimony as to the slackness of the Miller line, which even the "Celtic Chief" men and Capt. Macauley gave credit to, goes far to show that their evidence as to the "Arcona's" lines is also not to be credited.

NO ASSISTANCE FROM THE SHIP.

Appellees would have the court believe not only that Miller and the "Arcona" did nothing, but that the "Celtic Chief's" men also failed to assist. The court, however, found that "When the men and the ship's engines and appliances did work, they worked with energy and efficiency" (VIII, 3370). That the court was referring to the men on the "Celtic Chief" as distinguished from the men employed by the other salvors is made clear by the remainder of the paragraph from which the matter in question is taken (*Id.*). Counsel loses no opportunity to criticize Capt. Henry, and says that he "leaned pretty well on Capt. Macauley's advice" (brief, p. 200). If Capt. Macauley is to be placed in the gilded frame designed for him by the appellees, Capt. Henry did exactly right in deferring to his judgment. Let us here again remark that the lower court erred gravely in not making a deduction from its award to the other salvors on account of Capt. Macauley's services.

CREDIBILITY OF WITNESSES.

We shall simply deal here with the unfair comments on the evidence of Capt. Schroeder and Lieut. Conne-man of the "Arcona". The evidence of these men, taken about two years after the operations took place, is contrasted unfavorably with that of the Inter Island witnesses, because they could not give the wealth of detail treasured in the memory of the latter witnesses. We submit that the testimony of the "Arcona's" officers would have easily passed muster in an ordinary salvage suit, and is as full and clear as could well be expected after the lapse of time. Of course, however, they did not know they were to testify into a 3419-page record, and that every detail of their actions was to be looked at through the eye of a needle. That they may have testified incorrectly as to small details is of little importance, if they testified to the main facts as they saw them, which we submit they did. Equally unfair is the attack on the testimony of Capt. Henry, who also failed to realize the magnitude of the case. We will let the court judge for itself whether the attacks made are merited, or are not rather petty quibbling over small details.

AMOUNT OF AWARD.

It is suggested by counsel, *inter alia*, in discussing this subject, that the "Mauna Kea" and perhaps other vessels of the Inter Island Co. lost opportunities to take on freight by their delay at the "Celtic Chief". There is not one word of evidence in the record to establish

any such contention. Counsel suggests, however, that it can be inferred without specific proof, which we vigorously dispute. It was a part of the Inter Island case to make such proof if it had it. Judging from the way the case was tried, it is safe to say that the evidence would have been used if available. Moreover, specific proof *was* put on as to replacing the "Mikahala" with the "Ke Au Hou", showing that these specific details were in mind. We submit that this claim should be totally disregarded.

Appellees suggest that the award should be sustained in order to *encourage* salvage services and avoid the delay and expense of future litigation—in other words, property salvaged must be taught to settle on the terms of the salvors. We venture to express the opinion (borne out by cases in this court) that salvage claims are never settled in Honolulu without a lawsuit, because the claims of the local salvors there are *always excessive*. Each new ship that goes ashore there is treated as in the nature of a prize, excessive and petty details as to the service are gathered together and the delays, harassments and expense of legal proceedings, so feelingly alluded to, are largely due to complications caused by the salvors; while a salvaged ship on a foreign shore, largely friendless and with little evidence at her disposal except that of her own officers and crew, is placed at a great disadvantage. It is true that salvage should be encouraged, but the salvaged ship deserves *some* consideration. We venture to predict that the Inter Island Co. will, so long as its corporate life lasts, eagerly undertake salvage ventures and accept the

handsome profit which those ventures afford. That company must, however, mend its ways and be taught fairness or other records like the present will result.

To the salvage awards referred to in our main brief appellees have added three new cases—one of them dealing with the salvage of a derelict and another with a quasi derelict. In each case the salved value was too small to be of much assistance here as a criterion, and it is unnecessary to go into the same in detail.

We shall not deal further with appellees' treatment of the case of *The Hesper*, nor with the ingenious method by which the award in that case is made to lead to an award of over \$40,000 in the case at bar for the Inter Island Co. alone. We also shall not deal with the labored analysis of the *Loch Garve* case, except to correct counsel in his statement that the award was reduced because the lower court did not give enough credit to the "Manning". The award was reduced because of the error of the court in including the value of the "Mauna Loa" as a basis for fixing the salvage (182 Fed. at p. 525), just as the court erred in this case in including the value of the "Mauna Kea". It should also be remembered that no interest was allowed in that case either from the date of the salvage operations or even after the decree. The discrepancy between the two awards is, therefore, very much greater even than we thought, for in this case interest was provided for for both periods.

Counsel is in error in referring to the additional expense allowance as being \$3,561.77 (brief, p. 232). This allowance was \$2,011.77 (VIII, 3377).

Counsel on oral argument tried to impress upon the court the extreme danger attendant upon strandings in the Hawaiian Islands and tried to liken the situation to strandings off the Florida coast. We presume that the members of the court, like the writer, are somewhat familiar with these islands and their topography. The serenity of the climate, its mild weather and balmy breezes are well known and Honolulu has been well designated as "The Paradise of the Pacific". To attempt to assimilate the beautiful coral reefs, where vessels often grind safe beds for themselves, to the hard and perilous shores of Florida is to venture upon the absurd. Of course, counsel *must* find some such analogy in order to sustain an award which is even larger than those made in Florida, yet we submit that there is no such analogy, but that, on the contrary, Hawaii is an ideal spot for a stranding, if such stranding must take place.

The lower court allowed costs against appellees because of their excessive claims, and all (including the Miller Salvage Co.) now claim that this was unjust, *not* because the total claims of \$70,000 were not excessive, but because each appellee contends that it was the *other* that exaggerated its claim. The fact is, however, that each and every claim was grossly excessive and the court, properly using its discretion as to costs, discountenanced the making of such claims in the future—a salutary precedent as far as it went. As already suggested the court could even more justly have penalized the appellees in costs for unduly incumbering the record. The costs of appellants, before they were

forced to take this appeal, were very small indeed, because they tried their cases in the way salvage cases are usually tried. Reference is made to the division of costs in the *Manchuria* case, where the claim was far more excessive. In that case, however, the salvor accepted the bond of the claimant without any surety. Ever since the stranding, however, the appellants have been forced to make very heavy payments on the excessive surety bonds demanded by appellees (I, 23).

Finally we meet the claim that the awards to the Inter Island and Matson companies should be *increased* by giving them part of the award to the Miller Salvage Co. The latter company makes a similar claim, wanting a part of the Inter Island and Matson awards. We cannot more fitly close this brief than to leave the various appellees struggling to fatten themselves on something from the other.

Dated, San Francisco,
November 25, 1914.

Respectfully submitted,

E. B. McCLANAHAN,

S. H. DERBY,

Proctors for Appellants.

No. 2427

United States
Circuit Court of Appeals
for the Ninth Circuit.

R. M. COURTNAY and H. K. LOVE,
Plaintiffs in Error.

VS.

TOM P. KING and BAPTISTE SERAFINO,
Trustees,
Defendants in Error.

Transcript of Record.

Upon Writ of Error from United States District Court of
the Territory of Alaska, Fourth
Division.

FILED

MAY 28 1914

No. _____

United States
Circuit Court of Appeals
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Plaintiffs in Error.

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Trustees,
Defendants in Error.

Transcript of Record.

**Upon Writ of Error from United States District Court of
the Territory of Alaska, Fourth
Division.**

Due service and receipt of three copies hereof admitted this... *Sixth*day of May, 1914.

Cecil H. Clegg

Attorney for Defendants in Error.

INDEX.

	Page
Answer, Separate, of R. M. Courtney	6
Answer, First Further and Separate, of R. M. Courtney	7
Answer, Second Further and Separate, of R. M. Courtney	8
Answer, Separate, of H. K. Love	11
Answer, First Further and Separate, of H. K. Love	12
Answer, Second Further and Separate, of H. K. Love	17
Answer, Third Further and Separate, of H. K. Love	22
Assignment of Error	146
Bill of Exceptions	31
Bill of Exceptions, Notice of Filing of	140
Bill of Exceptions, Order Allowing	141
Complaint	2
Court's Instructions to Jury	128
Clerk's Certificate to Record	160
EXHIBITS:	
Plaintiffs' Exhibit 1, (Bill of Sale)	33
Plaintiffs' Exhibit 2, (Bill of Sale)	36
Plaintiffs' Exhibit 3, (List of Names)	60
Plaintiffs' Exhibit 4, (Notice to Marshal of Ownership of Personal Property)	62
Defendants' Exhibit A, (Certified Copy of Original Papers and Docket Entries in Commissioner's Court	87

Index.	Page
EXHIBITS—(Continued):	
Defendants' Exhibit B, (Certified Copy of Original Papers and Docket Entries in Commissioner's Court)	102
Judgment on Verdict	142
Motion, Defendant's, for Nonsuit or Instructed Verdict	84
Names and Addresses of Attorneys of Record...	1
New Trial, Motion for	138
New Trial, Order Overruling Motion for.....	140
Praecipe for Transcript	159
Reply to Answer of Defendant Courtney.....	26
Reply to Answer of Defendant Love.....	27
Stipulation Relative to Printing Record.....	1
TESTIMONY IN BEHALF OF PLAINTIFF:	
Samuel Fowler	55
Samuel Fowler (Cross-Examination)	55
Carl Post	56
Carl Post (Cross-Examination)	58
Baptiste Serafino	31
Baptiste Serafino (Cross-Examination)	43
Baptiste Serafino (Redirect Examination)..	53
Baptiste Serafino (Recalled)	58
Baptiste Serafino (Recross Examination)..	61
C. H. Ward (Deposition)	65
C. H. Ward (Deposition, Cross-Examina- tion)	74
C. H. Ward (Cross-Examination)	80
C. H. Ward (Recross Examination)	82
C. H. Ward (Further Redirect Examination)	83

Index. Page

TESTIMONY IN BEHALF OF DEFENDANT:

John Barrack	118
John Barrack (Cross-Examination)	122
John Durand	125
John Durand (Cross-Examination)	126
Baptiste Serafino	124
S. B. Waite	123
S. B. Waite (Cross-Examination)	124
Samuel R. Weiss	86
Verdict	137
Writ of Error	149
Writ of Error, Citation on	151
Writ of Error, Designation of Place for Hear- ing of	156
Writ of Error, Order Allowing and Fixing Bond	148
Writ of Error, Petition for	145
Writ of Error, Order Relative to Supersedeas Bond on	152
Writ of Error, Supersedeas Bond on	154
Writ of Error, Nunc Pro tunc Order Extending Time Within Which to File and Docket Cause on	157

Names and Addresses of Attorneys of Record.

McGOWAN & CLARK, Attorneys for Defendants
and Plaintiffs in Error, Fairbanks, Alaska.

CECIL H. CLEGG, Attorney for Plaintiffs and De-
fendants in Error, Fairbanks, Alaska.

In United States District Court for the Territory of
Alaska, Fourth Division.

No. 1799.

TOM P. KING and BAPTISTE SERAFINO,
Trustees, *and joint* Plaintiffs,

vs.

R. M. COURTNEY and H. K. LOVE,
Defendants.

[Title of Court and Cause.]

Stipulation Relative to Printing Record.

IT IS HEREBY STIPULATED that in printing the papers and records to be used on the hearing of the writ of error in the above entitled cause, for the consideration of the United States Circuit Court of Appeals for the Ninth Circuit, the title of the court and cause in full in all papers shall be omitted, except on the first page of said record, and that there shall be inserted in place of said title, the words "Title of court and cause"; also that the indorsements on all papers, except the Clerk's filing marks, and admissions of service, need not be printed; and also that the verifications of all pleadings may be omitted and the words "duly verified" inserted in place thereof.

Fairbanks, Alaska, April 11, 1914.

CECIL H. CLEGG,

Attorney for Plaintiffs.

McGOWAN & CLARK,

Attorneys for Defendants.

(Indorsed): Filed in the District Court, Territory of Alaska, 4th Div., Apr. 11, 1914. Angus McBride, Clerk.

[Title of Court and Cause.]

Complaint.

Comes now the above named plaintiffs and for cause of action against the defendants above named and each of them, alleges as follows:—

I.—That at all the times hereinafter mentioned plaintiffs were and now are acting trustees for the benefit of themselves and certain other creditors of the Russian Mining Company, an insolvent copartnership theretofore carrying on the business of mining in the Fairbanks Recording district, Alaska.

II.—That in the Fairbanks Recording District, Alaska, on the 11th day of June 1912, plaintiffs as such trustees were, and now are, the owners and entitled to the immediate possession of all of the following described personal property, situate in the Fairbanks Recording District, Alaska, namely,—

One double cylinder hoist

One 18 H. P. Boiler

One carrier

One bucket

One trolley cable

One hundred and twenty cords of wood

Six shovels

Four picks

Twelve feet pick steel

Eight point hose

Ten feet 5-8 inch Iron

Eighteen feet 1 inch pipe

Four gals. Benzine oil

Five gals. Red oil

One hack saw

One jack plane

One small hand drill

Thirty six dinner plates

Eight meat knives

Thirty knives and forks

Thirty table spoons

Twenty tea spoons

Twelve soup bowls

Thirty tea cups

Thirty saucers

Two large meat trays

Two mixing pans

Two dish pans

One tea pot

One coffee pot

Two large meat pots

One flour sieve

One syrup cup

One bread knife

Eight wheel barrows

Two dozen picks

Ten 10 ft points
Ten 12 ft points
One horse harness and sleigh
One hundred and forty five pounds fresh beef
Ten lbs coffee
Five lbs Baking powder
One lb. tea
Six 1-gal cans apples
Eighteen cans tomatoes
Fourteen cans beefs
Twenty five lb. box dried apples
 $\frac{3}{4}$ box Ivory soap
Three sacks rolled oats
Eighteen cans fig pudding
One hundred and fifty pounds Bayo beans
Forty pounds small white beans
Sixteen pcs bacon
One case bacon
Five lbs split peas
 $\frac{1}{2}$ gal. molasses
Twenty seven cans cream
Fifteen pounds sugar
Twenty six pkgs corn starch
Fifty pounds flour
Seventeen cans tomatoes
Six cans olive oil
28 cakes Armour's white soap
11 cans pumpkin; 5 lbs salt, 3 cans beets
Seven cans tomato catsup
15 lbs coffee
One box candles.

III.—That on the 11th day of June 1912, and prior to the commencement of this action defendants herein wrongfully and unlawfully seized and took possession of all of the above described personal property, and they do now wrongfully and unlawfully withhold and detain the possession thereof from plaintiffs, who are legally entitled to the immediate possession thereof.

IV.—That the above described property was on the 11th day of June 1912 and now is of the value of seventeen hundred dollars.

V.—That by reason of the wrongful taking and detention of the said property by defendants, plaintiffs have been deprived of the use thereof and thereby damaged in the sum of Three hundred dollars.

VI.—That prior to the commencement of this action plaintiffs demanded of defendants the return and redelivery of the possession of the said property above mentioned and the whole thereof, but to deliver the same to plaintiffs, said defendants have refused and do now refuse.

WHEREFORE plaintiffs demand judgment against said defendants for the return of all of said personal property, or in case return thereof cannot be had, then for the value thereof, to-wit the sum of Seventeen hundred dollars and damages in the sum of Three hundred dollars and costs of this action:

CECIL H. CLEGG,

Attorney for Plaintiffs.

(Duly Verified.) (Indorsed): Filed July 15, 1912.
C. C. Page, Clerk. By P. R. Wagner, Deputy.

[Title of Court and Cause.]

Separate Answer of R. M. Courtney.

Now comes R. M. Courtney, one of the defendants in the above entitled action, and answering for himself individually, for answer to plaintiffs' complaint on file in said action, admits, denies, and alleges as follows, to wit:

I.—Answering paragraph one of plaintiffs' complaint this answering defendant alleges that he has no knowledge or information concerning the matters therein set forth sufficient to form a belief, and basing his denial on such lack of information and belief, denies each and every matter and thing therein contained.

II.—Answering the allegations of paragraph two of plaintiffs' complaint, this answering defendant denies each and every matter and thing therein set forth.

III.—Answering the allegations of paragraph three of plaintiffs' complaint, this answering defendant denies each and every matter and thing therein set forth.

IV.—Answering the allegations of paragraph four of plaintiffs' complaint, this answering defendant alleges that he has no knowledge or information concerning the matters and things therein set forth sufficient to form a belief, and basing his denial on such lack of information and belief, denies each and every of the matters and things therein set forth.

V.—Answering the allegations of paragraph five of plaintiffs' complaint, this answering defendant de-

nies each and every of the matters and things therein set forth.

VI.—Answering the allegations of paragraph six of plaintiffs' complaint, this answering defendant admits the matters and things therein set forth.

• This answering defendant, for a further and first separate answer and defense to plaintiffs' complaint, alleges as follows, to wit:

(a) That, on or about the 11th day of June 1912, an action was duly and regularly instituted in the office of the Commissioner and ex officio Justice of the Peace in and for Fairbanks Precinct, at Chatanika, Fourth Judicial Division, Territory of Alaska, entitled J. E. Barrack, plaintiff, vs. The Russian Mining Company, defendant, which said action was numbered in said Court No. 43, and wherein said J. E. Barrack prayed judgment against the defendant for the sum of \$570.20 together with costs of suit.

(b) That at said time there was no United States Marshal or deputy marshal at the place where said Court was held, and pursuant to the provisions of the laws of the Territory of Alaska, Samuel R. Weiss, United States Commissioner and ex officio Justice of the Peace, the Judge of said Court, then and there appointed this answering defendant as a special officer for the purpose of serving the writ of execution issued out of said Court on said defendant by said United States Commissioner in the above last mentioned case, and on said 11th day of June 1912, delivered said writ of attachment to this answering defendant, who

thereupon, pursuant to the provisions thereof, levied on and attached all of the defendant The Russian Mining Company's interest in and to one lot of wood, one boiler house, and all machinery contained therein and in the mine of the defendants Russian Mining Company, or on the surface of said mine, and also on one messhouse, together with all provisions, ranges, cooking utensils, etc., contained therein, all being situate on Discovery claim on the Chatanika River, Fairbanks Precinct, Territory of Alaska, which said property so attached, as this defendant is informed and believes and so alleges, is embraced in the list of property claimed by the plaintiffs in their complaint in this action.

(c) That, pursuant to the instructions given to this answering defendant by the plaintiff in said action, and the United States Commissioner and ex officio Justice of the Peace aforesaid, said attachment was levied and this answering defendant placed a keeper in charge of said property and thereafter, under instructions of the Commr. sold as perishable property 145 lbs of beef for approximately \$40.00, which money was afterwards paid to the U. S. Marshal.

(d) That thereupon this answering defendant's authority ceased and was determined by the terms of his appointment, and this answering defendant has had nothing further to do with said property or any part thereof.

This answering defendant, for a further and sec-

ond separate answer and defense to plaintiffs' complaint, alleges as follows:

(a) That, on or about the 11th day of June 1912, an action was duly and regularly instituted in the office of the United States Commissioner and ex officio Justice of the Peace in and for Fairbanks Precinct, at Chatanika, Fourth Judicial Division, Territory of Alaska, entitled C. E. Danforth, plaintiff, vs The Russian Mining Company, defendant, which said action was numbered in said Court No. 44, and wherein said C. E. Danforth prayed judgment against the defendant for the sum of \$437.50, together with costs of suit.

(b) That at said time there was no United States Marshal, or deputy marshal, at the place where said Court was held, and pursuant to the provisions of the laws of the Territory of Alaska, Samuel R. Weiss, United States Commissioner and ex Officio Justice of the Peace, the Judge of said Court, then and there appointed this answering defendant as a special officer, for the purpose of serving on defendant the writ of execution issued out of said Court by said United States Commissioner in said cause, and on said 11th day of June 1912, delivered said writ of attachment to this answering defendant, who thereupon, pursuant to the provisions thereof, levied on and attached all of the defendant The Russian Mining Company's interest in and to one lot of wood, one boiler house, and all machinery contained therein and in the mine of the defendants Russian Mining Company, or on the surface of said mine, and also

one messhouse, together with all provisions, ranges, cooking utensils, etc., contained therein, all being situate on Discovery claim on the Chatanika River, Fairbanks Precinct, Territory of Alaska, which said property so attached, as this defendant is informed and believes and so alleges, is embraced in the list of property claimed by the plaintiffs in their complaint in this action.

(c) That, pursuant to the instructions given to this answering defendant by the plaintiff in said action, and by the United States Commissioner and ex officio Justice of the Peace aforesaid, said attachment was levied and this answering defendant placed a keeper in charge of said property.

(d) That thereupon this answering defendant's authority ceased and was determined by the terms of his appointment, and this answering defendant has had nothing further to do with said property or any part thereof.

Wherefore, this answering defendant prays that plaintiff take nothing by his said action against this answering defendant, and that this answering defendant go hence with judgment for his costs, and for such other and further relief as to the Court may seem meet and just in the premises.

McGOWAN & CLARK,

Attorneys for answering defendant.

(Duly verified.)

Due service hereof admitted this 18th April 1913.
Cecil H. Clegg, Attorney for Plffs.

(Indorsed): Filed in the District Court, Territory of Alaska, 4th Div., Apr. 18, 1913. C. C. Page, Clerk. By H. C. Green, Deputy.

[Title of Court and Cause.]

Separate Answer of H. K. Love.

Now comes H. K. Love, one of the defendants in the above entitled action and answering for himself individually, for answer to plaintiffs' complaint on file in said action, admits, denies, and alleges as follows, to wit:

I.—Answering paragraph one of plaintiffs' complaint, this answering defendant alleges that he has no information or knowledge concerning the matters sets forth therein sufficient to form a belief, and basing his denial on such lack of information, denies each and every matter and thing therein contained.

II.—Answering the allegations of paragraph two of plaintiff's complaint, this answering defendant denies each and every matter therein set forth.

III.—Answering the allegations of paragraph three of plaintiff's complaint, this answering defendant denies each and every matter and thing therein set forth.

IV.—Answering the allegations of paragraph four of plaintiff's complaint, this answering defendant alleges that he has not sufficient knowledge or information to form a belief as to the value of the property referred to in said paragraph, and basing his denial on such lack of information and belief, denies each each and every matter and thing therein.

set forth.

V.—Answering the allegations of paragraph five of said plaintiffs' complaint, this answering defendant denies each and every matter and thing therein set forth.

VI.—Answering the allegations of paragraph six of plaintiffs' complaint, this answering defendant admits matters and things therein set forth.

This answering defendant, for a further and first separate answer and defense to plaintiffs' complaint, alleges as follows, to wit:

(a) That, during all the times hereinafter mentioned, this answering defendant was, and still is, the duly appointed, qualified, and acting United States Marshal for the Fourth Judicial Division of the Territory of Alaska.

(b) That, on or about the 11th day of June 1912, an action was duly commenced in the office of the United States Commissioner and ex officio Justice of the Peace for Fairbanks Precinct, at Chatanika, Fourth Judicial Division, Territory of Alaska, by J. E. Barrack as plaintiff, against The Russian Mining Company as defendant, which said action was numbered in said Court No. 43, to recover the sum of \$570.22, with costs of action, on an open account for goods sold and delivered.

(c) That thereafter and on said 11th day of June 1912, on application of the plaintiff in said action, Samuel R. Weiss, United States Commissioner and Justice of the Peace of the last above named Court,

in whose Court said action was instituted, determined that the plaintiff in said action was entitled to a writ of attachment, and thereupon a writ of attachment was duly given and made by the said Judge in said action, wherein and whereby this answering defendant, in his capacity as United States Marshal aforesaid, was commanded to attach and safely keep all the property of the defendants in said action, and did then and there, pursuant to the authority in him vested by the laws of the Territory of Alaska, appoint R. M. Courtney, one of the defendants herein, as a special officer to serve said writ.

(d) That thereafter, and on said 11th day of June 1912, said defendant R. M. Courtney, in his said capacity as special officer, pursuant to said writ of attachment and in the manner prescribed by law, levied on and attached all of the defendants' right, title, and interest in and to one lot of wood, one boiler house, and all the machinery contained therein, and in the mine of the said defendants, and on the surface of said mine, and on one mess-house, together with all provisions, ranges, cooking utensils, etc., contained therein, all being situate on Discovery claim on the Chatanika River, Fairbanks Precinct, Territory of Alaska, which said property is described as follows, to wit: about 75 cords more or less of wood; 1 hoist, double cylinder; 1 boiler, 18 horsepower; 1 carrier; 1 bucket; 1 trolley cable; 6 shovels; 4 picks; 8 point hoses; 5 gallons red oil; 12 ft. pick steel; 10 ft 5-8 iron; 18 ft. 1 in. pipe; 4 gallons benzine oil; 1 hack saw; 1 jack plane; 1 small hand drill;

36 dinner plates; 8 meat plates; 30 knives and forks; 30 tablespoons; 30 teaspoons; 12 soup bowls; 30 teacups; 30 saucers; 2 large meat trays; 2 mixing pans; 2 dish pans; 1 teapot; 1 coffee pot; 2 large meat pots; 1 flour sieve; 1 sirup can; 1 bread knife; 145 lbs. beef; 1 lb. coffee; 5 lbs. baking powder; 1 lb. tea; 6 one-gallon cans apples; 18 cans tomatos; 14 cans beets; 25 lb. box dried apples; $\frac{3}{4}$ box Ivory soap; 3 sacks rolled oats; 9 cans fig pudding; 150 lbs bayo beans; 40 lbs small white beans; 16 pieces bacon; 5 lbs split peas; $\frac{1}{2}$ gallon molasses; 27 cans cream; about 15 lbs sugar; 26 packages of corn starch; 50 lbs flour; 17 cans tomatos; 6 cans olive oil; 28 cakes Armour's white soap; 11 cans pump-kin; 5 lbs salt; 3 cans beets; 7 cans tomato catsup; about 15 lbs coffee; 1 box of candles; which said property, as this answering defendant is informed and believes and so alleges is embraced in the list of property claimed by the plaintiffs in their said complaint in said action, and placed a keeper in charge thereof, and held the same subject to the further order of said Court.

(e) That, thereafter, such proceedings were had in the action aforesaid, before the United States Commissioner above named, that a judgment was duly given and made in said action in favor of the plaintiff, and against the defendants therein, to wit, The Russian Mining Company, for the sum of \$570.22, with interest at the rate of 8 per cent per annum thereon until paid, together with costs, taxed in the sum of \$22.70, and ordered that execution is-

sue therefor.

(f) That, subsequent to the levy of said attachment as aforesaid, and prior to the sale of said property under execution as hereinafter set forth, defendant Courtney caused an inventory to be made of the property attached that was of a perishable nature, and ascertained that a portion of said property was of a perishable nature, said property being described as 145 lbs of beef, and thereafter, and on the day of June, 1912, defendant Courtney caused said property of a perishable nature to be sold, in the manner prescribed by law, and said property was at said sale sold as defendant is informed and believes and so alleges to Paul Ringseth for the sum of approximately \$40.00, which said sum was by defendant Courtney paid to the Commissioner, who deducted his fees therefrom and delivered the balance \$34.34 to this debt., who held same subject to the final determination of said cause and proceedings taken subsequent to trial.

(g) That, thereafter and on the 21st day of June 1912, the United States Commissioner and ex officio Justice of the Peace aforesaid, pursuant to said judgment and in the manner prescribed by law, duly gave and issued an execution, which was directed to this answering defendant in his capacity as United States Marshal as aforesaid, which said execution directed this answering defendant to levy on, seize, and take into his possession sufficient of the real or personal property of the defendants in said action, to wit, The Russian Mining Company, to satisfy said judgment,

together with interest, costs, and increased costs, and to sell the same in the manner prescribed by law.

(h) That, thereafter and on the 24th day of June 1912, said writ of execution was delivered to this answering defendant, and this answering defendant, under and by virtue of the the execution aforesaid, thereafter and on the 26th day of June 1912, levied on all the personal property theretofore attached by said R. M. Courtney, save such as was already sold as perishable property as hereinbefore set forth, which said property, as this answering defendant is informed and believes and so alleges, is embraced in the list of property described in the plaintiff's complaint, and advertised the same for sale in the manner prescribed by law, and thereafter and on the 23d day of July 1912, at Discovery claim on the Chatanika River aforesaid, sold all the right, title, and interest of said defendant, the Russian Mining Company, in, to, and out of the property levied on by defendant herein, as aforesaid, save and except such as had been previously sold as perishable property, as described in paragraph (f) of this separate affirmative answer and defense, to J. E. Barrack, the plaintiff in said action, and Paul Ringseth for the sum of \$667.00, they being the highest bidders therefor, and said sum being the highest and best bid made at said sale which said sum, together with the amount realized from the sale of the perishable property, as aforesaid, less the amounts deducted by defendant herein as his fees in his capacity as United States Marshal aforesaid, was credited and applied

in satisfaction of the judgment and execution aforesaid, or so much thereof as was necessary so to be applied, leaving a balance in the hands of this answering defendant of \$90.60.

(i) That, as this answering defendant is informed and believes and so alleges, at the time of the levy of the attachment aforesaid, the said property so levied on and sold by him as aforesaid was in the exclusive possession of the Russian Mining Company, the defendant in the action hereinbefore particularly described, and it was the true owner thereof at all said times, and said property at the time of the levy of said execution was in the possession of this answering defendant as United States Marshal of the Fourth Judicial Division of the Territory of Alaska.

For a second further and separate affirmative answer and defense, this answering defendant alleges:

(a) That, during all the times hereinafter mentioned, this answering defendant was, and still is, the duly appointed, qualified, and acting United States Marshal for the Fourth Judicial Division of the Territory of Alaska.

(b) That, on or about the 11th day of June 1912, an action was duly commenced in the office of the United States Commissioner and ex officio Justice of the Peace for Fairbanks Precinct, at Chatanika, Fourth Judicial Division, Territory of Alaska, by C. E. Danforth (J. E. Barrack, Assignee), as plaintiff,

against The Russian Mining Company as defendant, which said action was numbered in said Court No. 44, to recover the sum of \$437.50, with costs of action, on an open account for professional services, medicines and supplies furnished, and and an assigned account of one Paul Ringseth.

(c) That, thereafter and on the said 11th day of June 1912, on application of the plaintiff in said action, Samuel R. Weiss, United States Commissioner and Justice of the Peace of the last above named Court, in whose Court said action was instituted, determined that the plaintiff in said action was entitled to a writ of attachment, and thereupon a writ of attachment was duly given and made by the said Judge in said action, wherein and whereby this answering defendant, in his capacity as United States Marshal aforesaid, was commanded to attach and safely keep all the property of the defendants in said action, and did then and there, pursuant to the authority in him vested by the laws of the Territory of Alaska, appoint R. M. Courtney, one of the defendants herein, as a special officer to serve said writ.

(d) That thereafter and on said 11th day of June 1912, said defendant R. M. Courtney, in his said capacity as special officer, pursuant to said writ of attachment and in the manner prescribed by law, levied on and attached all of the defendants' right, title, and interest in and to one lot of wood, one boiler house, and all the machinery therein contained, and in the mine of the said defendants, and

on the surface of said mine, and on one mess-hause, together with all provisions, ranges, cooking utensils, etc., contained therein, all being situate on Discovery claim on the Chatanika River, Fairbanks Precinct, Territory of Alaska, which said property is described as follows, to wit: about 75 cords more or less of wood; 1 hoist, double cylinder; 1 boiler, 18 horse-power; 1 carrier; 1 bucket; 1 trolley cable; 6 shovels; 4 picks; 8 point hoses; 5 gallons red oil; 12 ft. pick steel; 10 ft $\frac{5}{8}$ iron; 18 ft 1 in pipe; 4 gallons benzine oil; 1 hack saw; 1 jack plane; 1 small hand drill; 36 dinner plates; 8 meat plates; 30 knives and forks; 30 tablespoons; 30 teaspoons; 12 soup bowls; 30 teacups; 30 saucers; 2 large meat trays; 2 mixing pans; 2 dish pans; 1 teapot; 1 coffee pot; 2 large meat pots; 1 flour sieve; 1 sirup can; 1 bread knife; 145 lbs. beef; 1 lb coffee; 5 lbs baking powder; 1 lb. tea; 6 1-gallon cans apples; 18 cans tomatos; 14 cans beets; 25 lb. box dreid apples; $\frac{3}{4}$ box Ivoery soap; 3 sacks rolled oats; 9 cans fig pudding; 150 lbs. bayo beans; 40 lbs small white beans; 16 pieces bacon; 5 lbs split peas; $\frac{1}{2}$ gallon molasses; 27 cans cream; about 15 lbs sugar; 26 packages corn starch; 50 lbs flour; 17 cans tomatos; 6 cans olive oil; 28 cakes Armour's white soap; 11 cans pumpkin; 5 lbs salt; 3 cans beets; 7 cans tomato catsup; about 15 lbs. coffee; 1 box candles; which said property, as this answering defendant is informed and believes and so alleges, is embraced in the list of property claimed by the plaintiffs in their said complaint in said action, and placed a keeper in charge thereof,

and held the same subject to the further order of said Court.

(e) That, thereafter, such proceedings were had in the action aforesaid, before the United States Commissioner and ex officio Justice of the Peace above named, that a judgment was duly given and made in said action in favor of the plaintiff and against the defendants therein, to wit, The Russian Mining Company, for the sum of \$437.50, with interest at the rate of 8 per cent per annum thereon until paid, together with costs, taxed in the sum of \$22.70, and ordered that execution issue therefore.

(f) That, thereafter and on the 21st day of June 1912, the United States Commissioner and ex officio Justice of the Peace aforesaid, pursuant to said judgment and in the manner prescribed by law, duly gave and issued an execution, which was directed to this answering defendant in his capacity as United States Marshal as aforesaid, which said execution directed this answering defendant to levy on, seize, and take into his possession sufficient of the real or personal property of the defendants in said action, to wit, The Russian Mining Company, to satisfy said judgment, together with interest, costs and increased costs, and to sell the same in the manner prescribed by law.

(g) That, subsequent to the rendition of said judgment, in favor of said C. E. Danforth and against said Russian Mining Company, as this answering defendant is informed and believes and so alleges, said C. E. Danforth, for a valuable consideration sold

and assigned the judgment so rendered in his favor as aforesaid to J. E. Barrack, who thereupon became the owner thereof.

(h) That thereafter this answering defendant, under and by virtue of the judgment and execution aforesaid, in said cause of C. E. Danforth vs. Russian Mining Company, and on the 26th day of June 1912, levied on the personal property theretofore attached in the said cause of C. E. Danforth vs Russian Mining Company, as hereinbefore described, not previously sold as perishable property and advertised the same for sale in the manner prescribed by law, which said levy of said execution was subsequent to the levy of execution in the case of J. E. Barrack vs. The Russian Mining Company, particularly described in this answering defendant's first affirmative answer and defense, and thereafter and on the 23d day of July 1912, after the sale by this answering defendant of said personal property theretofore attached under and by virtue of the writ of attachment in said cause of C. E. Danforth vs The Russian Mining Company, under a prior judgment and execution in favor of J. E. Barrack, and after the satisfaction of said judgment in the case of J. E. Barrack vs. The Russian Mining Company, all of which is particularly referred to in this answering defendant's first affirmative answer and defense, to which reference is hereby specifically made for further particulars, this answering defendant had in his possession a surplus of \$90.60, which said sum this answering defendant, after deducting the fees;

and expenses allowed to him by law, in his capacity as United States Marshal as aforesaid, applied on the said judgment of C. E. Danforth (J. E. Barrack, assignee) vs. The Russian Mining Company.

(i) That, as this answering defendant is informed and believes and so alleges, at the time of the levy of the attachment aforesaid, the said property so levied on and sold by him as aforesaid was in the exclusive possession of the Russian Mining Company, the defendant in the action hereinbefore particularly described, and it was the true owner thereof at all said times, and said property, at the time of the levy of said execution, was in the possession of this answering defendant as United States Marshal of the Fourth Judicial Division of the Territory of Alaska.

For a third further and separate affirmative answer and defense, this answering defendant alleges:

(a) That, as answering defendant is informed and believes, and basing his allegation on such information and belief alleges, on or about the 29th day of April 1912, certain of the copartners constituting a part or all of the copartnership known as the Russian Mining Company executed an instrument, purporting to convey to one C. H. Ward certain of the personal property described in plaintiffs' complaint, to wit: one hundred cords of sixteen and four foot wood, one ten-horsepower American hoist, pipes, hose, fittings, and also one bucket, carrier, and bucket block, and also all cables, together with

all flumes and sluice-boxes, cooking range, dishes, etc., situate on claim No. One below Discovery on the Chatanika River, Fairbanks Precinct, Territory of Alaska.

(b) That, at said time, no actual transfer of said property was made to said C. H. Ward, and the possession of said property remained in the alleged assignors;

(c) That said Russian Mining Company, at said time, was largely indebted to other creditors, and as answering defendant is informed and believes and so alleges, the said pretended transfer was made for the purpose of defeating and defrauding the other creditors of said Russian Mining Company and was fraudulent and void.

(d) That, as answering defendant is informed and believes and so alleges, on or about the 11th day of June 1912, the said Russian Mining Company was indebted to J. E. Barrack and C. E. Danforth, and to other general creditors, whose names are unknown to this answering defendant, in large sums of money, and was also indebted to certain laborers employed by the said Russian Mining Company, and that, on said 11th day of June 1912, at an hour subsequent to the levy of the attachment on the property of said Russian Mining Company in the suit of J. E. Barrack and the suit of C. E. Danforth, as alleged in answering defendant's first affirmative answer and defense hereinabove set forth, the said Russian Mining Company, for the purpose of hindering, delaying, and defrauding the said J. E. Bar-

rack, C. E. Danforth, and other existing creditors, caused said C. H. Ward to execute a pretended assignment or release of the property, theretofore pretended to be transferred to him on the 29th day of April 1912, to the plaintiffs herein.

(e) That, at the time said pretended assignment was executed, attachments had already been levied on said property in the suits of J. E. Barrack and C. E. Danforth, as hereinbefore alleged, and said property was then actually in the possession of this answering defendant in his capacity as United States Marshal, by virtue of said property being in the possession of a keeper appointed by special officer Court-nay in the suits of J. E. Barrack and C. E. Danforth against said Russian Mining Company, as hereinabove set forth.

(f) That said Russian Mining Company, on the said 11th day of June 1912, and for a long time prior thereto, was insolvent, and said pretended assignment was made for the purpose and with the intent and design of hindering, delaying, and defrauding other creditors of said Russian Mining Company, and to give the plaintiffs in this action a preference over said general creditors of said Russian Mining Company.

(g) That, as answering defendant is informed and believes and so alleges, at all times from the said 29th day of April 1912 up to and including the 11th day of June 1912, the property so pretended to be assigned to C. H. Ward as aforesaid, and by him afterwards pretended to be assigned to the plaintiffs in

this action, was in the actual possession of said Russian Mining Company, and was being used by it in carrying on its mining operations on Discovery claim on the Chatanika River aforesaid, and no actual or continued change of possession of said property ever took place until such time as said property was taken possession of by this answering defendant, in his capacity as United States Marshal, through special officer Courtney, on the 11th day of June 1912, as hereinbefore alleged.

(h) That the plaintiffs have never been in possession of said property or any part thereof, and have no valid real or pretended claim against any part of said property described in plaintiffs' complaint, and the only property that was ever pretended to be transferred to them was the property described in the fraudulent bill of sale of 29 April 1912, made to said C. H. Ward.

(i) That, subsequent to said alleged assignment, said Russian Mining Company used a portion of said wood described in said pretended bill of sale until the 11th day of June 1912, at which time there only remained of said wood, pretended to have been transferred, about seventy five cords.

(j) That, as answering defendant is informed and believes and so alleges, the greater part of the groceries, etc., described in plaintiffs' complaint, was purchased by said Russian Mining Company subsequent to the alleged transfer to C. H. Ward on the 29th day of April 1912.

(k) That said alleged transfers of 29 April 1912

and 11 June 1912 were, as respects J. E. Barrack and C. E. Danforth, null and void, and plaintiffs and their alleged predecessor in interest have never been in either the actual or constructive possession of said property described in plaintiffs' complaint, or any part thereof.

For a fourth further and separate affirmative answer and defense, this answering defendant alleges:

(a) That no trust was ever created in plaintiffs herein by any instrument in writing, as prescribed by law, and any claims made by plaintiffs in this action as trustees for any persons whomsoever are without right and are void, as no trust was ever created or existed in the manner prescribed by law.

WHEREFORE: This answering defendant prays that plaintiffs take nothing by their said action and that this answering defendant have judgment for costs against said plaintiffs, and for such other and further relief as is meet and just in the premises.

McGOWAN & CLARK,

Attorneys for answering defendant.

(Duly verified.)

Due service hereof admitted this 18th April 1913.

Cecil H. Clegg, Attorney for Pltffs.

(Indorsed): Filed in the District Court, Territory of Alaska, 4th Div., Apr. 18, 1913. C. C. Page, Clerk. By H. C. Green, Deputy.

[Title of Court and Cause.]

Reply to Answer of Defendant Courtney.

Come now the plaintiffs herein and for reply to the

separate answer of defendant R. M. Courtney:

1. Deny all of the allegations contained in paragraphs A, B, C and D of the first further and separate answer and defense of said defendant R. M. Courtney contained in his said answer, and the whole of each of said paragraphs.

2. Deny each of the allegations contained in paragraphs A, B, C and D of the further and second separate answer and defense of said defendant R. M. Courtney contained in said separate answer, and the whole of each of said paragraphs.

CECIL H. CLEGG,

Attorney for plaintiffs.

Received service of a copy of the foregoing reply this 24 day of April, and I hereby waive verification thereof at this time and agree that the same may be verified by one of the plaintiffs at any time before trial.

McGOWAN & CLARK, By R. H. G.,

Attorneys for defendant Courtney.

(Indorsed): Filed April 24th, 1913. C. C. Page, Clerk. By P. R. Wagner, Deputy.

[Title of Court and Cause.]

Reply to Answer of Defendant Love.

Come now plaintiffs herein and for reply to the separate answer of the defendant H. K. Love, filed herein, allege as follows:

I.

(1) Deny each and all of the allegations contained in paragraphs B and C of the first further and sep-

arate answer and defense of said defendant H. K. Love contained in said answer, and the whole of each of said paragraphs.

(2) Deny each and all of the allegations contained in paragraph D of the said first and further separate answer and defense of said defendant H. K. Love, except the allegation that the property described in said paragraph is embraced in the list of personal property claimed by the plaintiffs in their complaint in said action.

(3) Deny each and all of the allegations contained in paragraphs E, F. G. H and I of the said first and separate answer and defense of said H. K. Love, defendant, contained in said answer, and the whole of each of said paragraphs.

II.

Further replying to the separate answer of defendant H. K. Love and to the second further and separate affirmative answer and defense therein contained, plaintiffs herein,

(1) Admit the allegations contained in paragraph A thereof.

(2) Deny each and all of the allegations contained in paragraphs B and C of said second and further separate and affirmative defense contained in said answer, and the whole of each of said paragraphs.

(3) Deny each and all of the allegations contained in paragraph D of said second further affirmative defense contained in said answer, except the allegation that the personal property enumerated in said paragraph is embraced in the list of property

claimed by the plaintiffs in their said complaint in said action.

(4) Deny each and all of the allegations contained in paragraphs E, F, G, H and I of said second further and separate answer of defendant contained in said answer, and the whole of each of said paragraphs.

III.

Replying to the third further and separate affirmative answer and defense of the said defendant H. K. Love, contained in said separate answer filed herein, plaintiffs herein,

(1) Deny each and all of the allegations contained in paragraphs A, B, C, D, E, F, G, H, I, J and K of said third further and separate answer and defense of said defendant contained in said answer, and the whole of each of said paragraphs.

IV.

Replying to the fourth further and separate answer and defense of said defendant H. K. Love, contained in said answer, plaintiffs herein,

(1) Deny each and all of the allegations contained in paragraph A thereof, and the whole of said paragraph.

V.

Further replying to the matters and things set forth in said separate answer and defense of the said H. K. Love, plaintiffs herein allege:

(1) That at the time of the institution of each of the actions mentioned in said answer, and of the issuance of the writs of attachment and execution

mentioned therein, said Russian Mining Company had no right, title or interest in any or to any of the personal property described in plaintiff's complaint and in paragraph D of the first further and separate answer and defense of said defendant.

(2) That the said Samuel R. Weiss, Commissioner and Ex-officio Justice of the Peace, Fairbanks Precinct, at Chatanika, Fourth Judicial Division, Alaska, had no legal authority to issue said writs of attachment or said writs of execution mentioned in said answer, and that each of said writs were illegal and void.

(3) That said Samuel R. Weiss, acting as Commissioner and Justice of the Peace aforesaid, had no jurisdiction over the defendant Russian Mining Company in either of said causes mentioned in said answer, and had no authority to appoint said defendant R. M. Courtney as a special officer to serve any process in either of said causes, and that the pretended appointment of said R. M. Courtney was illegal and void.

WHEREFORE, plaintiffs pray judgment against defendant as prayed for in their complaint herein.

CECIL H. CLEGG,

Attorney for Plaintiff.

Received service of a copy of the foregoing Reply this 24 day of April, 1913, and I hereby waive verification thereof at this time and agree that the same may be verified by one of the plaintiffs at any time before trial.

McGOWAN & CLARK,

By R. H. G.

Attorneys for Defendant H. K. Love.

(Indorsed): Filed April 24th, 1913. C. C. Page, Clerk. By P. R. Wagner, Deputy.

[Title of Court and Cause.]

Bill of Exceptions.

BE IT REMEMBERED that this cause came on regularly for trial before Honorable Frederic E. Fuller, judge of said court, at 10 o'clock A. M. on November 13, 1913, Cecil H. Clegg, Esq., appearing as attorney for plaintiffs, and Messrs. McGowan & Clark as attorneys for defendants. Proceedings were regularly had to empanel a jury, and twelve men, after being sworn on voir dire, and examined and accepted by the respective parties, were sworn as the jury to try the case. Mr. Clegg made an opening statement in behalf of plaintiffs, and Mr. Clark made an opening statement in behalf of defendant, when the following proceedings were had and testimony was taken:

BAPTISTE SERAFINO, a witness for plaintiffs, after being first duly sworn, testified substantially as follows, upon

DIRECT EXAMINATION BY MR. CLEGG:

My name is Baptiste Serafino; I am engaged in the business of mining; I have lived in the Fairbanks country about seven years; I know the Russian Mining Company, worked for them on 1 below Discovery, Chatanika; I remember the time they closed down work, on or about June 10; on the morning of the 11th they said they were going to shut down, they paid off some of the men—some of their

friends and nobody else; almost everybody they didn't pay, when we found that we couldn't get our wages, went to see Mr. Ward—practically all the laborers, eight or ten or eleven, I do not remember how many; two members of the Russian Mining Company went with us and we went to Ward's place.

Q. What was done there? What took place there at Ward's place?

A. It took place—Ward and the Russian Mining Company, they turned over the bill of sale to us of the property; wood and Machinery, and—(Interrupted)

MR. CLARK: We object as a conclusion. It speaks for itself. It is in writing.

MR. CLEGG: Did he have the bill of sale there?

A. Yes sir.

Q. Do you think you would recognize it if you saw it?

A. Yes sir, I do.

Q. Is that the bill of sale (Hands paper to witness).

A. Yes sir. Ward wrote that out while we were there; two members of the Russian Mining Company were there and agreed to it; I know Nick Chakoff's signature; the paper is not in his writing, but I recognize his signature to it; I also recognize Kosma Milakoff's signature to the instrument; also Walter Rosin's; I saw Mr. C. H. Ward sign this bill of sale.

Said bill of sale was then admitted in evidence, marked Plaintiff's Exhibit 1, and is as follows:

"KNOW ALL MEN BY THESE PRESENTS:
That I, N. Choff (Nick Chakoff), Walter Rosin, Mike Larkin, John Urik, Paul Williams, K. Marakoff, John Robin, A. Nolkin, C. Suthoff, and L. Kuczynski The Russian Mining Co. the party of the first part, for and in consideration of the sum of Sixteen Hundred and twenty five dollars lawful money of the United States of America, to us in hand paid by C. H. Ward, the party of the second part, the receipt whereof is hereby acknowledged, do by these presents grant, bargain, sell and convey unto the said party of the second part—executors, administrators and assigns Two (2) hundred cords of sixteen and four foot wood one (1) ten (10) horse power American Hoist, pipes, hose, points, fittings and also one (1) bucket and carrier and bucket block and also all cables, together with all flume and sluice boxes belonging to us, also cooking range, dishes ect this property is situated on No One below Discovery Chatanika flats.

TO HAVE AND TO HOLD the same to the said party of the second party,—executors, administrators and assigns forever. And—do for his heirs, executors, administrators, covenant and agree to and with the said party of the second party executors, administrators and assigns, to warrant and defend the sale of the said property, goods and chattels hereby made unto the said part—of the second party, executors, administrators and assigns, against all and every person and persons whomsoever lawfully claiming or to claim the same.

IN WITNESS WHEREOF —ha—hereunto set

Serafino and Tom P. King who act as trustees for the others. Witness: James M. White.

C. H. WARD."

The part read was written by Mr. Ward, in the presence of the laborers and two members of the Russian Mining Company I have mentioned before, none of whom made any objection and all of whom were satisfied with it; King and myself agreed to act as trustees, and the others said they were satisfied to have us act as trustees no-one made any objections; there was no other paper written by the Russian Mining Company at that time that I know of.

Q. I hand you this paper which I have in my hand now, and which I ask to have marked Plaintiffs' Exhibit B.

A. Oh, yes. That was—(Interrupted)

THE COURT: You were asked to look at it.

MR. CLEGG: Q. Who signed that paper there?

A. The Russian Mining Company and Joe Ward.

Q. You see that signature there? A. Yes.

Q. Whose signature is that?

That is the signature of one of the members of the company, Nick Chakoff; the other is Walter Rosin; the next signature is mine and the next is King's; we were all there when it was signed and I saw all of them sign it.

Q. State when it was signed with reference to the time this Bill of Sale was signed?

A. Yes sir, the same time.

Q. What time of day was that?

A. On the 11th of June, 1912.

Q. What time of the morning?

A. About 11 o'clock.

Q. Where were you? A. In Ward's cabin.

MR. CLEGG: I would like to offer this in evidence. (Marked Plaintiff's Exhibit 2)

MR. CLEGG: (reads Plaintiff's Exhibit 2 as follows:)

"Chatanika, Alaska, June 11th, 1912. Bill of Sale. This is to certify that the Russian Mining Company has turned over the cook house and groceries to laborers for wages including cook house and cooking utensils and grub and range.

Russian Mining Company: Nick Chakoff, Walter Rosin.

Trustees: Baptiste Serafino, T. P. King.

Witness: John F. Erickson, R. M. Courtney."

Q. Now, state what you did under those instruments as trustees that same day.

A. Well, we went down on the claim and took possession of it.

MR. CLARK: We object to that as a conclusion, and ask that it be stricken.

THE COURT: The answer may stand.

MR. CLARK: We save an exception.

MR. CLEGG: Q. How many of you went down there?

A. All of us.

Q. All of the laborers? A. Yes sir.

Q. And when did the Russian Mining Company leave there?

A. Some left that day, and some the next day.

Q. Did they attempt to do anything with this property after they turned it over to you?

A. Who, the Russian Mining Company?

Q. Yes sir. A. No sir.

Q. What did you do when you got down there, you and the rest of the men.

A. We started to gather up everything.

Q. Did you commence to make a list of it?

MR. CLARK: We object to the leading questions.

MR. CLEGG: Q: What did you commence to do?

A. Well, we tried to take a list of that stuff that was left there. Well, take—estimate the things.

Q. Took a rough estimate? A. Yes sir.

Q. Of the list of stuff that was there. A. Yes sir.

Q. How long were you down there undisturbed in the possession of the property?

MR. CLARK: We object, as calling for a conclusion.

MR. CLEGG: Q. How long were you allowed to remain there?

A. We was there the whole day.

Q. Did you see anybody else around there that day.

A. Well, I see Mr. Courtney—marshal Courtney. He came and served those attachments.

Q. What time of day was that?

A. That was about 1 o'clock.

Q. About one o'clock? A. Yes sir.

Q. How long did you continue to stay there?

A. Well, we was going to stay as long as we could, but the day after that we was in the mess house and

he came and take the grub away from us; and we were all going to stop him but he said he had an order of the court, so we though we couldn't do anything with him at all.

Q. And you left there.

A. No. Well, we didn't have anything to eat, so we had to leave there.

Q. You didn't do anything more with the property. A. No, I didn't.

Q. What property was there there at the time you went down there after Ward signed these papers?

MR. CLARK: We object as immaterial. The property that is alleged was turned over to them is specifically described in a written agreement. In their complaint they allege a lot of property that is not in their alleged bill of sale, and we object to any testimony about any property except what they allege was turned over to them.

THE COURT: Is that the only way which you claim to have acquired a right of possession, through these bills of sale?

Mr. CLEGG: Yes sir. Through taking possession of it.

THE COURT: Through the bills of sale you have here?

Mr. CLEGG: Yes sir.

THE COURT: You can show that you took possession of the property mentioned in the bill of sale.

MR. CLARK: But the question he is asking is: what other property was there.

THE COURT: You may ask him to describe the property he claims here. Of course, if there is more than he has title to, it can be disregarded.

MR. CLEGG: What was there, calling your attention to special items.

A. I couldn't make more than one hundred cords, more or less.

Q. What was there in the way of machinery?

A. The machinery was—I should say a 20 or 25 horse power boiler, and about an 8 horse power hoist.

Q. Was that what you call a double cylinder hoist?

A. Yes sir.

Q. An 18 horse power boiler?

A. No, a 20 horse power boiler, or 25 maybe, and of course there was all kind of fittings there.

Q. What about the carrier?

A. Carrier and bucket and pipes, cables, and so on. I have been running machinery for the last ten or twelve years; I can estimate the value of machinery, have had occasion to handle buy, and sell mining machinery, carriers, hoists and boilers during that time and from my experience would estimate that the hoist was worth about \$250.00 or \$300.00, the boiler, about \$500.00, the carrier, about \$50.00; the bucket was pretty old, worth about \$40.00; the trolley cable, about \$50.00, the wood, about \$10.00 per cord. While working for the Russian Mining Company, I was foreman in charge of the active mining operations.

“Q. You were telling the court and jury this morning what took place up there at Ward's on the morn-

ing of the 11th of June. Did you at that time get any statement from Nick Chako , or the Russian Mining Company, of the names of the men and the amounts due them at that time? A. Yes sir.

Q. I will ask you to examine this paper here (Hands same to witness) and state whose signature that is at the bottom of it.

A. Yes sir, that is Mike and Walter Rosin's.

Q. Were they the active members of the company there.

A. Yes sir, they are supposed to be the head men.

Q. State when you received this statement from them?

A. Well, I received that, I think it was, on the 8th or 11th of June.

Q. Were you, as foreman, familiar with the amounts that were due the workmen there at that time. A. How is that?

Q. Were you, as foreman, familiar with the amounts that were due the workmen there at that time. A. Yes sir.

MR. CLEGG: I am going to offer that in evidence.

MR. CLARK: Is this in the English language?

MR. CLEGG: No.

MR. CLARK: What is it in?

MR. CLEGG: Russian.

MR. CLARK: We object as unintelligible.

THE COURT: If you offer it, you may furnish a translation of it. I think you should furnish a translation of it before it is offered.

MR. CLARK: Let me question him a little before it is offered.

Q. What is this first name at the top?

A. I can't make that out any more than you can.

Q. That is not a man's name?

A. Yes sir, it is a man's name.

Q. Do you know what that amount shows there?

A. No, I couldn't say.

Q. Then you don't know whether those were wages due to that man?

A. I know that, but I couldn't place every man that was there.

Q. What is the first word there?

A. (Witness pronounces a word unintelligible to reporter)

Q. Who is he?

A. Well, I will tell you. I was the foreman there, but the firm was taking the time, I wasn't taking the time.

Q. Do you know that this man worked there?

A. Yes.

Q. That man whose name is down there first, did he ever come to you and ask you whether you were going to get his money for him? A. Yes sir.

Q. Do you know him?

A. Yes, I know him if I see him.

Q. There was such a man as that, was there?

A. Yes sir.

Q. How long had he been working there?

A. He done enough work for that amount of money.

Q. That is not the question. How long had he been working there?

A. He had been working four or five months that I know of.

Q. There was such a man as that there?

A. Yes sir.

Q. Are all these other names, names of men?

A. Yes sir.

MR. CLEGG: Do you still object to the introduction of this?

MR. CLARK: I think we can let it go if counsel will submit a translation before the case is submitted. There is no objection at the present time.

THE COURT: Very well.

MR. CLEGG: Q. How much was due you as foreman? A. \$10 a day.

Q. What was the amount?

A. \$200. "I do not remember how much was due Mr. Fowler, as he worked there before I worked there. I didn't keep the time, one of the firm always kept the time. I do not know how much was due Carl Post. The statement you have shown was given me by Nick Chakoff and Walter Rosin, the men who signed it.

OBJECTION by MR. CLARK that the amount set after the names of the men in the statement were not proof that said amounts were due and were hearsay.

"THE COURT: It may be introduced as a paper that was given to him at that time, but it is not evidence of the amounts contained in it as being due to the different men, without further testimony.

MR. CLEGG: You may cross-examine.

CROSS-EXAMINATION.

By MR. CLARK: Q. You and your partner Mr. King were trustees; you were to hold this property for all of the laboring men, were you not?

A. Yes sir.

Q. And if the Russian Mining Company paid one of these men after this time, you didn't have to pay him anything did you? A. I don't think so.

Q. So you were holding this property to secure the amounts that were due to these men.

A. Yes sir.

Q. You were not holding it for any other purpose. A. No sir.

Q. And if the Russian Mining Company paid off these men themselves, then you wouldn't be claiming the property, would you? A. I should say not.

Q. All you wanted was to get your money out of it. A. Certainly.

Q. You don't know whether the Russian Mining Company ever paid any of these men since that time. A. Yes. I know that.

Q. You know some of them have been paid, don't you?

A. No sir. I know two of them that have been paid, but they are not there.

Q. Do you know of any of the men that are on here that have been paid?

A. I am positively sure they didn't pay anybody else.

Q. You are positive of it? A. Yes sir.

Q. Do you know whether or not any suits have been started down here in the lower court?

MR. CLEGG: We object as not cross-examination.

THE COURT: Objection overruled.

MR. CLARK: Q. You know, don't you, that two members of the Russian Mining Company have recently filed a petition to go through bankruptcy?

A. Yes sir.

Q. You know, don't you, that some of the working men that you were trustees for, attached some of the wages of the Russian Mining Company since the property was turned over to you? A. Yes sir.

Q. And you know that they have got their money, don't you? A. They got part of it.

Q. You don't know how much they got.

A. No, not exactly.

Q. Are they included in your list here?

A. Show me the list and I can say. I know the fellows.

Q. This was a full list of all the wages that were due at that time? A. Yes sir.

Q. Since that, some of them have attached and got some of their money. A. Only one attached.

Q. Which one is it that attached? (Hands paper to witness)

A. I can't see him here. That is a Jap that attached one of the laymen, and his name is not here at all. That is about the only man I could recognize, and Sam Fowler, and that is all. He is not there.

Q. Those people might have attached, and you not

know it. A. Yes it might have been so.

Q. And the Russian Mining Company, or the members of the Russian Mining Company, might have gone to almost any of these men and paid them off, and you not know about it. A. Yes sir.

Q. So, all that you know personally yourself is that there is \$200 due to you. A. Yes sir.

Q. And you don't know how much is due to any of the other men. A. The list shows.

Q. But outside of what they told you was due.

A. Yes I got that list from the—:(Interrupted)

Q. You don't know.

A. I got that list from the time keeper.

Q. He told you this was right. A. yes sir.

Q. You don't know of your own knowledge that this list is correct. A. I am almost sure.

Q. All you know is what the time keeper told you.

A. Yes. "The time-keeper was Walter Rosin, a member of the firm.

"Q. Now, when Mr. Ward wrote on this bill of sale that was introduced in evidence this morning, that was the only property that Ward turned over to you, or that you say he turned over to you, wasn't it?

A. Yes sir.

Q. Just what is described in that. A. Yes.

Q. Then there was another paper that was introduced in evidence, this blue paper here (Plaintiff's Exhibit 2)—A. Yes sir.

Q. That was given to you by the Russian Mining Company. A. Yes sir.

Q. Was this blue paper, Plaintiffs' Exhibit 2, signed by the Russian Mining Company at the same time that this other instrument marked Plaintiffs' Exhibit 1? A. Yes sir.

Q. All signed at the same time? A. Yes sir.

Q. And all of you were together there in the cabin? A. Yes.

Q. And you had not gone out and taken possession of the property before that, had you?

A. Not before I got the bill of sale.

Q. And everybody that signed here, the Russian Mining Company, and yourself, and the witnesses—they all signed at the same time, did they?

A. Yes sir.

Q. They were all there at the time the signing was done? A. Yes sir.

Q. What time of the day was that?

A. That was along about 11 o'clock.

Q. What time did Mr. Courtnay come down there and levy the attachments?

A. Well, I am not positively sure, but I think it was 1 o'clock.

Q. When was the first time you had seen Mr. Courtnay that day? when he came down to levy the attachments?

A. Well, I saw him about 12 o'clock around town.

Q. But he was not down at the works; he was not down on the ground,— A. No sir.

Q. —until the time he levied the attachments.

A. No sir.

Q. What did he do when he came down and levied

the attachments?

A. Just stuck up the notices. That is all.

Q. Just stuck the notices up? A. That is all.

Q. Did he give any papers to anybody?

A. No sir.

Q. How many notices did he put up?

A. About three I guess, three or four.

Q. Did you have any talk with him up town when you were up there before that? A. No sir.

Q. He put up three or four notices around. He put some up on the wood, did he? A. Yes sir.

Q. And he put some up, on the boiler house?

A. Yes.

Q. Where else did he put up the notices?

A. On the house and the cabin.

Q. On the house itself?

A. On the house and the cabin.

Q. Did you see him give any papers to any member of the Russian Mining Company? A. No sir.

Q. You are certain he was not there before 1 o'clock. A. I think it was that way.

Q. You feel certain he was not there until after these bills of sale had been given?

A. I don't think so.

Q. If he had been there you would have known it, wouldn't you? A. Certainly.

Q. Did you know Mr. Cournay very well.

A. Yes sir.

Q. If he had been around the works before he came down and levied the attachments, you would have seen him. A. Yes sir, certainly.

Q. You are certain he was not there. A. Yes sir.

Q. How many of you were present in the cabin at the time the bills of sale were made out?

A. The whole crew?

Q. And the members of the Russian Mining Company too. A. Yes sir.

Q. Who wrote out this bill of sale?

A. Joe Ward himself.

Q. Joe Ward? A. Yes sir.

Q. The Bill of Sale marked Plaintiffs' Exhibit 1?

A. Yes, Joe Ward wrote it.

Q. And signed it? A. Yes sir.

Q. Did he also write out this other bill of sale on the blue paper marked Plaintiffs' Exhibit 2?

A. Yes sir.

Q. And you are certain that that was written at the same time that Joe Ward wrote Plaintiff's Exhibit 1. Plaintiffs' Exhibit 2, on the blue paper, you think was written at the same time as Plaintiffs' Exhibit 1?

A. Well, I think it was the same time.

Q. Now, just think again. Isn't it a fact that this plaintiffs' Exhibit 2—That wasn't given to you, was it, until after the marshal had been down there and put up his attachment papers?

A. No sir, they gave me that before.

Q. You are certain it was before? A. Yes sir.

Q. Examine the witness' signatures there and see if you do not find the name of R. M. Courtnay there at the bottom, right down here at the bottom, the last name "R. M. Courtnay".

MR. CLEGG: That is illegible to me. He cant make it out.

MR. CLARK: You will admit that is his signature?

MR. CLEGG: Yes, I will admit that it is, but the witness couldn't figure the name of Courtney out of that.

MR. CLARK: It is admitted that that name there is R. M. Courtney. A. I guess it is.

Q. And he signed as one of the witnesses.

A. Yes sir.

Q. Now, when you come to think it over, isn't it a fact that after Mr. Courtney came down and stuck up his attachment notices, is when the bill of sale Plaintiff's Exhibit 2 was written out by someone else besides Ward, and that you got Courtney to sign as a witness?

A. Now, wait a minute. I thought it was the same time, but I remember now that that was written out at Christopher's house.

Q. That was after the attachment was levied, wasn't it? A. I think it was. I guess so.

Q. This original instrument, Plaintiffs' Exhibit 1, that was signed by Mr. Ward—that was signed up before the attachment was levied? A. Yes sir.

Q. Then, after Mr. Courtney had stuck up the attachment, then you went up to Mr. Christopher's house in Chatanika, and then this bill of sale (Exhibit 2 of Plaintiffs) was made out. A. Yes sir.

Q. And that is the time John Erickson and R. M. Courtney signed that as witnesses. A. Yes sir.

Q. So, when you testified a while ago that they were both made at the same time, you were mistaken.

A. Yes, I was mistaken then.

Q. After the attachment was levied, after Mr. Courtnay went and put up his notices, then you boys went down, didn't you, and started to eat some of the provisions, or something of that kind.

A. Yes sir.

Q. Then Courtnay came and told you to get out, that that was under attachment. A. Yes.

Q. Then Courtnay sold that sometime afterwards, sold the provisions. A. Yes sir.

Q. So, the only property for which there was any written agreement, or bill of sale we will call it, before the attachment was levied, was just this that Mr. Ward had in his bill of sale that is marked Plaintiffs' Exhibit 1. A. Yes.

Q. That is the only property that had been transferred to you and Mr. King as trustees.

A. Yes sir. "I should judge that there was about 100 cords of wood, more or less, on the ground, I didnt measure it. The Russian Mining Company was burning the wood from that pile from the 29th day of April 1912, when the bill of sale was given to Mr. Ward, until the 11th of June, when they shut down. They were using quite a few men, were burning the wood carrying on mining operations; used the largest pieces for timbers in the mine; were running pretty steady; burned between 2½ and 3 cords of wood per day, which included the timbers used in the mine; the mine was run about 40 days after the bill of sale

was given Ward.

“Q. Do you know just how much wood was there at the time that this original so-called bill of sale was made to H. C. Ward?

A. That is what I gave—nearly one hundred cords, more or less.

Q. When it was first given to Ward on the 29th of April? A. I wasn't there then.

Q. You don't know much there was then. A. No.

Q. You didn't measure the wood in June after they shut down mining, did you? A. No.

Q. After Courtney told you to get out of the bunk house, or out of the messhouse, you boys left the claim, didn't you? A. Yes sir.

Q. You hadn't put up any notices before that, had you? A. No sir.

Q. And you didn't put up any after that?

A. No sir.

Q. So, after Courtney told you that you couldn't eat up the grup, you boys went away and you got work elsewhere. A. Yes sir.

Q. And none of you went back again, did you, until after the marshal sold the property? A. No sir.

Q. You came to see Mr. Clegg, and had Mr. Clegg serve notice on the marshal claiming some of this property, didn't you? A. Yes sir.

Q. That was all that you did in regard to the property. A. Yes sir.

Q. After Mr. Ward gave you this paper in the cabin, what did you boys do just after that?

A. We just went down on the claim.

Q. You just went down and commenced to look around a little bit. A. Yes sir.

Q. And you went up town, didn't you?

A. I went up town afterwards, in the afternoon sometime.

Q. And you saw Courtney up town about 12 o'clock, didn't you?

A. I couldn't say exactly, but I think it was about that time.

Q. Right after Ward had signed this paper, you went over onto the claim. A. Yes sir.

Q. And a little bit after that Mr. Courtney came down and put up some notices. A. Yes sir.

Q. Then is when you went up town and signed this blue paper Plaintiffs Exhibit 2; that was the time it was signed up.

A. Yes sir. "I have bought a new hoist, the same kind as the one on the ground, would say that it is worth \$250. It was not in bad shape, was in good running order, a man did not get stuck in the shaft a short time before because of any defect in the hoist. It do not know that it cost over \$100. to repair the hoist after it was sold by the marshal. I think it would have sold there on the ground for \$200. or \$250. I am not a mechanic, but I could tell. I did not examine it, because I wasn't running it, but I know it was in fair shape. I have not bought or sold any carriers, would say that the carrier was worth \$50.00. I am not making a guess at it; as I know that they cost new from \$75 to \$125; I know that a second-hand carrier is not worth as much as a

new carrier, that is why I say that that carrier is worth \$50. The bucket was pretty well worn out; I have not bought any buckets, have not sold any machinery out at Chatanika; about the time mentioned I think the wood was worth in the open market \$10. per cord. Yes, I am just thinking that. In the summer time the wood costs all the way from \$1.50 to \$3. to move wood. It costs more in the summer than in the winter. A good deal of the wood had fallen down and was lying in the wet. It was all 16-ft. poles. It was good wood, some small wood and some good wood. Some was good and some wasn't.

"Q. Don't you know that there was not to exceed seventy five cords of wood left in that pile?"

A. It may be so.

Q. You were guessing a while ago when you said there were 100 cords?

A. Just taking a rough guess at it."

UPON REDIRECT EXAMINATION BY MR.

CLEGG:

I don't know where Tom King is; I heard he was over on the Coast, have not seen him since the suit was started a year ago last July. I remember King was here at that time, I got him to put up some money to pay the costs of the action.

"Q. Now, about this paper that has been introduced in evidence and marked as Plaintiffs' Exhibit 2, which you said was made at Christopher's--

A. Yes.

Q. I want to understand what your statement is

with reference to the time that was made out. Keeping in mind the time that Courtney came down onto the property and attached the property— A. Yes.

Q. Was it before or after that?

A. Before that lease?

Q. This paper that was made out at Christopher's.

A. I don't remember, but it was made after the property was turned over to us.

Q. What?

A. It was made after the property was turned over to us, that is, after the bill of sale.

Q. After the Ward bill of sale was turned over to you—(Int—? A. Yes.

Q. —this was turned over to you. A. Yes sir.

MR. CLEGG: Q. What is your statement as to the time that second paper was made out?

A. I couldn't say the time, because I don't remember. But that paper was made out in Christopher's house sometime in the afternoon, but I couldn't say the hour because I don't remember. I thought at the time that paper was made out that it was wrote by Joe Ward, but it was not. It was wrote by another man.

Q. Who was it wrote it?

A. It was the bartender there. I don't know who it was.

Q. Was that after Courtney had been down on the property? A. Yes.

MR. CLEGG: That is all.

MR. CLARK: That is all."

SAMUEL FOWLER, witness for plaintiffs, after being duly sworn, testified in substance as follows, upon direct examination by MR. CLEGG:

My name is Sam Fowler; I am a stationary and steamboat engineer; was employed by the Russian Mining Company during the spring of 1912, as an engineer; I worked from November or December until the 29th day of May, 1912; I mined sometime, probably a month; I am familiar with the property in question on the 11th day of June, that was being used by the Russian Mining Company; have had experience with mining machinery, such as hoists, carriers, buckets etc.; was running the hoist there on the property when I was working there; I would consider the hoist worth about \$200 easy enough. the carrier worth about \$50., the bucket, I couldn't say how much—I do not remember what condition it was in. I know the wood that was on the ground, can't tell the exact amount there on the 11th of June, would consider it worth about \$9. a cord, at least I think that is a fair price. I know there was a trolley cable there and consider it of the value of \$50. anyway.

UPON CROSS EXAMINATION BY MR. CLARK:

The Russian Mining Company got a larger bucket from Joe Ward; I do not remember that it was in bad shape, only that they wanted a larger bucket and they changed the bucket; the carrier and cable was second hand; do not know whether any part of the hoist was broken on the 11th of June or not; if it cost \$100. to repair the hoist after the 11th of June,

I wouldn't be able to say whether it was then in the same condition as when I knew it. I don't know its condition on the 11th of June, was not there and didn't see it; the last I saw of it was on the 29th of May. I was there after the 29th of May, but didn't pay any particular attention to it, just saw it running all right. In estimating the value of the wood, it was what I would pay for it to put it on the ground where it was at that time. If people at a distance wanted the wood, they would have to pay \$9. a cord for the wood and move it from there. They would have to pay for moving it, I don't know whether they could get it placed on their ground for \$9. I say it was worth \$9. per cord on the ground for mining, I don't know what it was worth on the open market. I can't say that I do, except wood that came in there on the train.

CARL POST a witness for plaintiffs, after being duly sworn, testified in substance as follows, UPON DIRECT EXAMINATION BY MR. CLEGG:

My name is Carl Post; I am a miner; I know Mr. Serafino and Mr. King; I worked for the Russian Mining Company last spring before the 11th day of June; I remember the time I quit there, which was on the 8th or 9th of June; I didn't get any money; I went with some of the men to get my money; I went with the boys who had been working there and the Russian Mining Company said we would have to wait until a cleanup; after the cleanup they went broke and I never got my money. I remember

Joe Ward; I went to his place one morning with the rest of the men; I never got the money; Ward signed a bill of sale; all the boys that were working there were there at that time; I remember a few by name, there were ten or eleven of them, I can't tell exactly. All the members of the Russian Mining Company were there when Ward signed the paper, the bill of sale.

“Q. What was said there at that time about Serafino?”

A. Well, he is the one the pay comes to. He is entitled to that bill of sale, and he wanted to turn that bill of sale to Mr. Serafino. He wanted them to pay the labor.

Q. Turn it over to Serafino? A. Yes sir.

Q. For him to pay— A. Yes sir.

Q. —out of the property? A. Yes.

Q. Was that satisfactory to you? A. Yes.

Q. How did the other boys feel about it?

A. All the boys were satisfied with that.

Q. Did the Russian Mining Company— A. Yes.

Q. Agree to that? A. Yes sir.

Q. Can you read Russian?

A. Not quite enough.

Q. Did you ever see this paper before (Hands a paper to witness) Take it and look at it, and see if you ever saw it before. Do you know anything about that?

A. I was see them make it.

Q. Where did you see it?

A. In the same place that we been working.

Q. They made it there at that place? A. Yes.

Q. When was it, the same day that you were up at Ward's. A. Yes sir, the same day.

Q. Can you read that? A. No.

Q. You cannot read that.

A. No, I cannot read that. "Yes, I know how much was due me. When I quit there was about \$257.50.

UPON CROSS-EXAMINATION BY MR. CLARK:

"Q. Did you find your name in that list?

A. I never looked. I think I find it.

Q. I will let you look and see (Hands paper to witness) Can you find your name in that list?

A. That (showing) is supposed to be me.

Q. The first name is— A. Carl.

BAPTISTE SERAFINO, a witness for plaintiffs, recalled, testified UPON DIRECT EXAMINATION BY MR. CLEGG, in substance as follows:

I have a list written in English of the names of the men who claim wages due at the time they quit, and of the amounts—of the people that authorized me to act for them under the trust. They have set opposite their names, in the majority of cases, the amounts due. Most of them were there at Ward's place, in the room at the time Ward signed the bill of sale. The list was not made out after Mr. Clegg had gone on the ground, it was not made a long time after the suit was begun. I think the list was made out the same day and each man had his own name on there and that list was made out to me by the Russian

Mining Company." I am positive it was made out that same day. I am certain that it was not made after the suit was commenced. I do not know how it happens that there are names on there that were not on the list made by the Russian Mining Company. The list was signed by all the man, maybe some of them wasn't around there and wasn't put on that, but the list was made by the timekeeper and he figured out the amount and everything which each man had coming.

"MR. CLARK: We still object, because they first set forth this list in Russian as the list of the people he held for. Now they come in with another list containing entirely different names, and claim that he held for them.

A. They are supposed to be the same names.

MR. CLARK: But they are not.

THE COURT: I understood he was offering it to show an act of ratification.

MR. CLARK: He is asking the amounts due.

MR. CLEGG: It is to get in the record the men for whom this man was acting as trustee, and the amount due them.

MR. CLARK: It cannot be proved that way.

THE COURT: You can ask him the question, but, as to the amount due them, it is not competent evidence.

MR. McGOWAN: This list (Indicating) is signed by the Russian Mining Company, the people that made the trust. The laborers could not make the trust.

MR. CLEGG: They consented to it.

MR. McGOWAN: Only the ones on this list signed by the Russian Mining Company. And we object to this list (Indicating) as irrelevant, incompetent and immaterial.

THE COURT: So far as they differ, we will consider that later."

I know Bozs Wucettih also Nick Cvietovich, Mike Zizich, Enan Zalipa, Alick Honlob, Alexander Honlob. I was there when they signed this paper.

"MR. CLEGG: We will introduce this paper without the amounts due them. We don't care anything about the amounts.

MR. CLARK: We object as we contend that there are names on there that do not belong there.

THE COURT: The paper may be admitted for the purpose stated.

(Marked Plaintiffs' Exhibit 3)

(Plaintiffs' Exhibit 3 is a list of names as follows:)

"Bozs Wucettih.

Nick Cvietovich

Mike Zizich.

Enan Honlob

Alexsandr Honob

Gob. Ston

Alick—

Tom King

Sam Falar

Nick Aldatoff

Shorn

Gob Jankowski

Call Post

Baptist Serafino

Juan Mien Seki.'

MR. CLARK: We note an exception. (Exception allowed)

MR. CLEGG: With the exception of this Juan Mien Seki, has any one of those men ever got any portion of the amount they claim from the Russian Mining Company?

MR. CLARK: That is not redirect examination.

THE COURT: Q. Do you know whether they have or not?

A. Well, I know there is one that had, but I don't know anybody else besides him.

MR. CLEGG: That is all.

UPON RECROSS-EXAMINATION BY MR.
CLARK:

I do not know where all these men are. Nick Aldatoff quit working on the 10th of June. He was there on the 11th and 12th, his name was on the list which was furnished.

"A. Yes, that is his name right there. (Indicating)

MR. CLARK: Q. That is Chaltoff. I mean Nick Aldatoff.

A. Oh, that is another. Yes, I know him.

Q. He wasn't working there at that time?

A. No, he was not. That is the fellow that hauled the wood.

Q. He was not one of the laborers at all?

A. No sir.

Q. He was not there on the day that you boys were

appointed trustees, was he?

A. No. He wasn't there.

Q. He merely signed his name to this long after?

A. No, not long after; the same day as those fellows.

Q. He was not one of the laborers at all. A. No.

Q. You didn't consider when you were appointed trustees that you were trustees for any except the laborers that were working there. A. Yes sir.

Q. You didn't consider you were trustees for Aldatoff? A. No.

Q. He didn't sign it until the next day, did he—Aldatoff?

A. No. I think he signed it the same day, the 11th.

Q. He signed it late in the afternoon, didn't he?

A. Yes sir.

Q. These other men whose names are signed afterwards, they signed later in the day, didn't they?

A. You know how it is. When I meet you a half an hour afterwards, I met another one and have them sign it, and so on."

Plaintiffs then introduced in evidence their Exhibit No. 4, as follows:

"Fairbanks, Alaska, June 29, 1912.

To the United States marshal for the Territory of Alaska Fourth Division, H. K. Love, Esq. and any deputy:—

You and each of you are hereby notified that the undersigned Baprist Serafino and Tom P. King, as trustees are the owners and entitled to the possession of all that certain personal property consisting

of 150 cords of sixteen and four foot wood, hoist, carrier, cables, pipes, points, flumes, sluice boxes, and all mining machinery and implements and tools whatsoever, hardware, groceries, provisions and buildings, now in your possession as said U. S. Marshal, and heretofore in the possession of one R. M. Courtney, a Special officer appointed by Hon. S. R. Weiss, Commissioner and ex-officio Justice of the Peace of Chatanika, Fairbanks Recording Precinct 4th Division, Alaska, and seized and taken and levied upon by said Courtney as aforesaid in those certain actions in the Commissioner's Court of the aforesaid Commissioner at Chatanika, said actions being entitled respectively A. Christopher, plaintiff, against Russian Mining Company, defendant, and John Barrack, plaintiff, against Russian Mining Company, and———against Russian Mining Company, defendant, each of said actions having been commenced on the 11th day of June, 1912, and writs of attachment having been issued in each of said causes in the afternoon of said day, and the above described property having been taken and seized and held by said Courtney unlawfully from the possession of the undersigned on the afternoon of said day;

And you are further hereby notified that the undersigned are the owners and were such owners on the 11th day of June 1912 of all of the above described property, prior to the issuance and service of said illegal and unlawful writs of attachment and prior to the illegal and unlawful levy and pretended levy thereunder, by virtue of the instruments in writing,

(true copies of which are hereto attached), and you are further notified that the undersigned are entitled to the immediate return and delivery of all of said above described property, and they do now and hereby demand of you the immediate return and delivery thereof within five days from the delivery to you of this notice, or in case of your failure to comply with this request the undersigned will at the expiration of said time be compelled to and will commence an action in the District Court of said Territory at Fairbanks for the re-delivery of all of said property to the undersigned, or in case delivery cannot be had then for the value thereof to the amount of Seventeen hundred dollars (\$1700.00) together with damages in the sum of Five hundred dollars (\$500.00) for the wrongful taking and detention thereof.

You are further notified that all of said property at the time of the pretended levys aforesaid by said Courtney as such Special Officer was conveyed to the undersigned, and delivery and transfer made thereunder to us, and the same was in our possession as trustee for the benefit of the laborers to whom said Russian Mining Company was then indebted, all of said property being in our possession as a pledge for security for the payment of the debts owed by said Company to the respective laborers, exceeding in amount the sum of \$1600.00

Yours respectfully

BAPTIST SERAFINO

TOM P. KING

Trustees

By CECIL H. CLEGG

their attorney

Received service of a copy this 29th day of June, 1912.

H. K. LOVE, U. S. Marshal.

By J. B. MATHEWS Deputy."

(The above marked Plaintiffs' Exhibit 4)

MR. CLEGG: I would like at this time to introduce in evidence the deposition of C. H. Ward, taken by stipulation in this case before E. T. Wolcott, notary public, on September 9th last.

MR. MCGOWAN: It was taken in behalf of defendant.

MR. CLEGG: I am introducing it as my evidence.

In the deposition of C. H. Ward, a witness for defendant, taken before E. T. Wolcott, a notary public, Fairbanks, Alaska, September 9, 1913, upon oral interrogatories, in the presence of Cecil H. Clegg, attorney for plaintiffs, and John A. Clark, attorney for defendants, said witness testified, in substance as follows, UPON DIRECT EXAMINATION BY MR. CLARK:

My name is C. H. Ward; I have been mining in the Fairbanks District since 1903; I know Tom P. King and Baptiste Serafino; I have an interest in Discovery and one below Chatanika Flats, where Serafino, King and others were working in 1912, where they were working for Russian Mining Company for wages; the Russian Mining Company had a lease on my property and Serafino and King were employes of the Russian Mining Company; the

Russian Mining Company were unable to pay their bills and had trouble with their men.

“Q. Did you have any wood or machinery that they were using? A. I had machinery.

Q. Did they buy any wood from you, or agree to buy any wood from you? A. No sir.

Q. I mean; did the Russian Mining Company have an option from you to purchase any wood from you?

A. No.

Q. I show you this instrument (Handing paper to witness) and ask you if that is your handwriting.

A. It is.

Q. Was that in connection with any deal that they had there, or any mining operations they were carrying on?

A. Yes. They had given me a bill of sale of the wood.

Q. Was that to secure money that was owing from them to you? A. Yes.

Q. Did you take possession of the wood that they gave you the bill of sale of?

A. I left it lying on the claim where it was.

Q. Did you put up any notices of any kind claiming the wood. A. No.

Q. Was this paper I have shown you, an option back to them that you gave them to purchase the wood? A. Yes.

Q. Did they ever pay you for that wood?

A. They did not. No.

MR. CLARK: We ask to introduce this paper in evidence.

MR. CLEGG: No objection.

(Marked as Defendants' Exhibit A)

MR. CLARK: Q Concerning the machinery that they were using, was that your machinery?

A. Part of it. Yes.

Q. Did you ever sell it to them? A. I did.

Q. Did they ever pay you for it? A. They did not.

Q. Did they ever sell it back to you, or give it back to you?

A. I took possession of it after they closed down.

Q. On June 11th, 1912, did you turn over any mining machinery or wood to Sarafeno and King as trustees for anybody? A. I did.

Q. Just state the circumstances under which that came about? State what you know in connection with that matter.

A. Well, they wanted to get an attachment on it. I had a bill of sale of the wood and machinery for the machinery they had bought from me, and a note I held, and they wanted to get an attachment, and they wouldn't make the attachment out for them. At 9 o'clock in the morning they wanted the attachment, and they wouldn't make an attachment out for them. So they came to me about it. And in the meantime, afterwards, it was attached the same day by different parties. It was attached at 12 o'clock by different ones—Ringseth, and I don't know who else. And after they wouldn't give them an attachment on it, as I held that option and a note against it I turned it over to the men for their wages.

Q. What did you do to turn it over to the men?

A. I gave them an agreement. I guess they have got it yet.

Q. Was that after the Ringseth attachment had been levied upon the property?

A. That was before. It was given at 11 o'clock.

Q. At what time was the attachment levied?

A. About 12 o'clock, somewhere about 12 o'clock.

Q. Where was the machinery and wood at the time you say you gave it over to them.

A. On One Below, Chatanika Flats.

Q. In whose possession was it?

A. It was in the Russian Mining Company's possession yet.

Q. What did you do towards turning it over to them?

A. To the men?

Q. Yes.

A. I turned over the note I had, and the agreement I had with the Russian Mining Company—the option, and also gave them—I believe I gave them the lay papers, but I wouldn't be sure.

Q. Where were you when you did this?

A. I was in my cabin on the Chatanika.

Q. And they were there with you at that time?

A. They were there with me.

Q. How long after this was done was the attachment levied?

A. About an hour I suppose, or an hour and a half.

Q. What did the men do between the time you say your turned it over to them and the time the attachment was levied.

A. They did nothing.

Q. They just stood around there and did nothing.

A. They were around there and did nothing.

Q. They didn't stick up any notices of any kind on the wood or on the machinery, or anything of that kind?

A. I believe they put up notices on the wood.

Q. Do you know when those notices were put up?

A. Directly afterward. I wouldn't be certain of it, because I was working at the time, but I think they did.

Q. Did you see them put them up?

A. No sir. But they told me they were going to put them up.

Q. You don't know of your own knowledge whether they did or not?

A. No. I don't know whether they did or not.

Q. Did you at that time on June 11th, 1912, sign an instrument that reads as follows (reads) "Chatanika, Alaska June 11 1912. I the undersigned holding a bill of sale of mining property described in this bill of sale, do hereby release said property to the following laborers of the Russian Mining Company. They are to hold wood and machinery for wages due them. This release is given to Robert Serafino and Tom P. King who act as trustees for the others." Signed 'C. H. Ward.' 'Witness: James M. White.' Was that the instrument that you gave them?

A. Yes sir. That was the instrument that I gave them.

Q. They were to hold it as security to guarantee the payment of their wages.

A. Yes.

Q. Do you know whether or not Sarafeno or King ever got their money out of the Russian Mining Company after that?

A. Not that I know of. I never saw any of them afterward.

Q. When the Russian Mining Company shut down out there, they gave you a bill of sale covering wood, a hoist, and pipes and points and hose and fittings, bucket and carrier, bucket block, and cables, flume and sluice boxes, cooking range, dishes, etc., They gave you that bill of sale at that time.

A. That bill of sale was given to me before they closed down.

Q. That was in April. A. Yes.

Q. They went right on using that machinery and wood and everything. A. They did.

Q. You didn't stick up any notices, did you, on the property, claiming it.

A. I had White stick them up.

Q. Do you know whether they were put up on all of the machinery. A. I do not know.

Q. Do you know what the wording of the notices were? A. No. I don't know.

Q. Do you know whether the notices remained there?

A. They remained there for some time.

Q. Do you know whether that bill of sale was recorded. A. It was not. No.

Q. Did you ever file it for record yourself?

A. No sir.

Q. Or ask anyone else to do it? A. No sir.

Q. The certified copy attached to the complaint in this action says that it was filed for record at the request of Duke & Thompson on the 31st day of May, 1912, and recorded in volumes 2 Bills of Sale, page 95, Records of Fairbanks Precinct. That would be here in town. Do you know anything about that, about the recording of it?

A. I wasn't there at the time. I left my partner James White looking after things, and he might have filed it for record.

Q. Or asked Thompson to do it.

A. Or asked Thompson to do it.

Q. This bill of sale was given to you as security for your indebtedness.

A. It was.

Q. And if they paid your indebtedness, you were to turn it back to them.

A. I was to turn it back to them. "Between the 29th of April, 1912 and the time I made the bill of sale to King and Serafino, no part of the indebtedness was paid. They owed me approximately \$1,250.00, but they agreed to pay for the machinery and the note. I asked them to give me the bill of sale because I was afraid they would be attached by someone else and I did not want to attach them myself. I had it given to me to keep them from being attached, because if they were I wouldn't get anything.

"Q. You simply considered that you held that as security, and if they paid you the money you would turn it back.

A. Yes. If they paid me the money, I certainly

would turn it back.

Q. When Serafino and King were trying to get out an attachment you simply released whatever claim you had on it to Serafino and King as trustees for the others.

A. Yes. My claim against the machinery was \$250.00 after I took my own machinery, and they paid a note in the First National Bank for \$600.00.

Q. What was that note concerning?

A. I went on a note to the First National Bank for \$600.00.

Q. Was that included in the \$1,250.00?

A. No. It was not.

Q. All they still owed you on the machinery was \$250.00?

A. After I took my own machinery back. On what they agreed to pay for it.

Q. Do you mean the taking of this bill of sale?

A. I gave them an option on this machinery for \$1,000. and besides that I held a note against them for \$250.00.

Q. So you considered that Serafino and King, when you turned it over to them as trustees—you considered you were simply releasing the claim you had on it as security for your claim; you were releasing that to them.

A. I was.

Q. So as to protect them on their wages. A. Yes.

Q. And the only instrument that was executed by the Russian Mining Company to you was the bill on sale on the 29th of April, 1912.

A. That was all.

Q. And they continued to use the machinery just as they had before. A. They did.

Q. They continued to burn up the wood that was on the ground.

A. Yes. "They owned one boiler that isn't described in the bill of sale, and the only property they turned back to me to be held as security is what was described in the bill of sale; they had a boiler there that they did not turn over—a small 18 or 20 H. P. boiler, I guess. I had nothing further to do with the transaction, as I turned over the bill of sale I had to King and Serafino.

"Q. And you considered that they were holding it in the same way you held it. In other words, you gave them the title that you had.

A. I did. "I was aware they were trying to get out an attachment in the forenoon, that is Serafino and King were. Weiss, the Commissioner refused to issue it to them. They didn't come to me at all. I went to them. My idea in turning it over to them was not to prevent Ringseth from getting his first lien upon it by attachment, but to protect myself with them too.

"Q. In what way would it protect you?

A. In what way would it protect me?

Q. Yes.

A. Protect me in the suit probably. Still, I had notices up.

Q. You mean, as far as the ground was concerned?

A. Yes sir.

Q. You had non-liability notices up, posted up?

A. Yes.

Q. You didn't want to get mixed up in any of these attachment suits.

A. I did not.

Q. That is all you know about the transaction.

A. That is all I know about it.

Q. You didn't have a bill of sale of the 18 horse-power boiler?

A. No. All I had a bill of sale of is in that (Indicating Ex A)

Q. That is all you turned over to Serafeno and King.

A. Yes."

UPON CROSS EXAMINATION BY MR. CLEGG:

"Q. Mr Ward, I want to show you this instrument which Mr Clark has been examining you about and which he has mentioned as the bill of sale. This instrument is numbered 36413-95, recorded on the 31st day of May, 1912, at 15 minutes past 10 A. M. and recorded in volume 2 of Bills of Sale, page 95, in the records of the Fairbanks Recording Precinct, Territory of Alaska by John F. Dillon, recorder. I want you to examine that and state if that is the bill of sale that you had reference to when you were being examined. (Hands same to witness)

A. Yes. That is it.

Q. Now, Mr. Ward, at the time of the execution of this instrument on the 29th day of April, 1912, who was the owner of this property mentioned and described in this bill of sale?

A. I was.

Q. Prior to the execution of this bill of sale.

A| The Russian Mining Company.

Q. That is what I mean. Before this bill of sale

was executed, who was the owner of all this property mentioned in this bill of sale?

A. The Russian Mining Company I suppose.

Q. As far as you know.

A. As far as I know.

Q. To the best of your knowledge.

A. To the best of my knowledge.

Q. You never heard anybody else claim it.

A. No.

Q. They gave you this bill of sale of this property in lieu of a mortgage, to secure you for moneys that you had advanced or had agreed to advance in their operations.

A. Yes, moneys and machinery I had furnished them.

Q. Now, at the time you executed this instrument that I hold which reads, (reads) 'Chatanika, Alaska, June 11, 1912, I, the undersigned, holding a bill of sale of mining property described in this bill of sale, do hereby release said property to following laborers of the Russian Mining Company. They are to hold wood and machinery for wages due them. This release is given to Robert Sarafeno and Tom P. King who act as trustees for the others. C. H. Ward Witness: James M. White' I say, at the time you executed that instrument on there, the situation had not changed any since the 22nd day of April.

A. It had not. No.

Q. And your transfer of your interest in the property and your rights to the property mentioned in this bill of sale was with the consent and at the re-

quest of the Russian Mining Company?

A. It was. Yes.

Q. They were all—Some of the chief men of the Russian Mining Company were present at the time?

A. There was six of them there.

Q. Six of them conferred with the laborers.

A. Yes. "The names of the six members of the copartnership are Nick Chakoff, Walter Rosin, Kosma Milkoniff, Mat Larkin, one was Kucyzinski, the engineer, and I do not know who the other was. The transfer of the property to Serafino and King was made for the purpose of securing the payment of the various amounts due the various laborers to King and Serafino, as their trustees, at their consent and request. I don't know how much was due from the Russian Mining Company to the laborers who constituted Serafino and King their trustees. I believe it was somewhere in the neighborhood of \$1600.00. Nearly all the laborers were present when King and Serafino were constituted trustees and agreed to act as such. They were present at my cabin.

"Q. There was no objection by any of them at that time as to this method of securing the payment of their wages? A. No.

Q. So that the transaction in all respects by the execution of this instrument by you here—this indorsement on the back,—was bona fide and in good faith. A. Yes.

Q. And meant for exactly the purpose for which it was intended, for which it is stated there.

A. Yes sir.

Q. That is correct, is it? A. Yes sir. It is.

Q. That was done with the consent, acquiescence and approbation of the Russian Mining Company who were there represented in person, or a great many of them. A. Yes.

Q. There was no other intention manifested by you, with the approval or consent of either of these parties, or the Russian Mining Company, in transferring this property to these laborers or to the trustees. A. No. It was for their wages alone.

Q. As security for their wages. A. Yes sir.

Q. Don't you recollect that this indorsement here on this bill of sale which has been shown to you, was made about 9 o'clock in the morning instead of 11, as you have testified?

A. No. It was not quite that early.

Q. It was somewhere between 9 and 11 you think?

A. Yes sir, between 9 and 11, because we were not up until 8 o'clock.

Q. And this bill of sale was executed by you and this property turned over to these trustees for the reason that they went to Commissioner Weiss out there for the purpose of getting an attachment and he refused to issue one. A. Yes sir.

Q. They intended to attach this identical property. A. They did. Yes.

Q. And was to prevent any costs accruing to the laborers or any expense to them, that you voluntarily turned it over to them and put them in your

shoes. A. It was.

Q. So far as you are concerned, you have relinquished all claims or rights of any nature you have to any of this property mentioned in this bill of sale.

A. I relinquished everything when I turned that over to them.

Q. That was bona fide your intention, that the laborers could use that property by selling it or transferring it to anybody else and apply the money on their wage account. A. Yes.

Q. You didn't require them to go through any formality or account to you for the proceeds.

A. No.

Q. As far as the transaction was concerned and the relinquishing of your rights, it was the same as if you had turned it over to them voluntarily and told them to handle it themselves and pay themselves. A. Yes.

Q. That was the understanding with the Russian Mining Company and these trustees.

A. It was. They were there at the time.

Q. Even if they had got more money out of this property than was due to them, you didn't feel that they were under any obligation to make an accounting to you for it?

A. No sir. "There were something like 150 cords of wood on the ground at the time of the execution of this relinquishment to the trustees. There was 16 and 4-ft. wood. I should judge the 4-ft. wood was worth \$10.50 per cord and the 16-ft. wood, \$8.00

or \$8.50 or \$9.00.

“Q. After the transfer of all of this property mentioned in the bill of sale to the trustees, Mr. Ward, you know that they went down there on the property and took possession of it prior to the time that any attachment was taken out?

A. Yes. They were down there.

Q. You were down there at the same time?

A. No. I was in the cabin.

Q. Were you not down there working?

A. I was working right close to the mess house.

Q. Right close to the mess house on this property where the range and cooking utensils mentioned in this bill of sale were located?

A. That boarding house wasn't on the same claim I was working on.

Q. You know for a fact, however, that they went down there and were in possession of all of this property prior to the time of the levy of these attachments?

A. Yes. There were some of them at the mess house and some of them at the boiler house.

Q. Don't you know when Courtney went down there assuming to act as a special officer that he drove the men from the mess house and took the grub away from them?

A. I don't know anything about that. “The 10 H. P. American hoist was pretty badly used. It was not worth much. The approximate value of the pipes, points, fittings, bucket, carrier, bucket block and cables was not more than \$250.00 or \$300.00 They

were old pipes, old buckets and old cables.

“Q. You were very much disappointed that the purpose of your transfer of this property to the trustees for the benefit of the laborers was not carried out.

MR. CLARK: We object as immaterial.

A. Sure I was, because I wanted to see them get their money.

Q. And you wanted to see the plan agreed upon accomplished.

A. The laborers of the Russian Mining Company agreed to that before they came to see me.

Q. They agreed to this procedure before they came to you and requested you to carry it out.

A. I went to the Russian Mining Company and wanted to turn it back to them so they could turn it over to the men themselves.

Q. They said it would be simpler for you to do it.

A. Yes sir.

Q. So it was therefore done that way?

A. Yes sir. “There was no intention of defrauding anybody in this transfer, on my part nor on the part of the Russian Mining Company, as far as I know, nor on the part of the trustees.

NOTE: (The bill of sale marked Plaintiffs’ Exhibit 1 on the trial was here introduced and marked Plaintiffs’ Exhibit 1 in the deposition, copy of said bill of sale being heretofore set out.)

UPON CROSS EXAMINATION BY MR CLARK:

“Q. The Russian Mining Company and the laborers had agreed that it should be turned over to

Sarafeno and King as trustees before they came to you.

A. They agreed to appoint Sarafeno and King as trustees up in my cabin and save all of them signing that paper.

Q. Didn't I understand you to say a while ago that they had agreed before they came to you in regard to whom the trustees should be?

A. They agreed among themselves. I went to them and wanted to turn the bill of sale over to the Russian Mining Company. I told them I didn't expect anything out of it; that they could turn it over to the laborers.

Q. Did you turn back your own boiler to them?

A. I did not. No.

Q. You considered that the property you held was still theirs. and merely held it for your security, and when they paid you you would turn it back to them.

A. I would turn it back when I got my money.

Q. At the time that bill of sale was first given to you, Vachon was threatening an attachment?

A. Not that I knew of.

Q. You didn't know about that. A. No.

Q. Did they come to you voluntarily and offer to turn it over to you and give you a bill of sale of it?

A. I went to them. They pulled the oiler down at that time. I know it was after the stack was off.

Q. In regard to them taking possession, all you know is that they said they put up notices. A. Yes.

Q. You didn't see them yourself.

A. No. I didn't go down there.

Q. You don't know what they did between the time you turned this over and when Courtney came down there and attached.

A. No. We were working within a hundred feet of the mess house, and some of them were in the boiler house.

Q. You didn't see any notices up?

A. I didn't see them.

Q. Would you have seen them if there had been any posted up around there?

A. They couldn't post any on the mess house, because that belonged to us; but on the boiler house and the wood on the property, I wouldn't have seen it, no.

Q. You don't know anything about that, whether they had any notices posted or not.

A. No. "I don't know whether any of the men for whom King and Serafino held as trustees have since sued the Russian Mining Company; I did not get all my money for my machinery; I had not measured the wood and do not know how much was there at the time the attachment was levied. All I know is what they told me.

UPON RECROSS EXAMINATION BY MR.

CLEGG:

I saw the wood afterwards, it was scattered all over. I judge there would be over 100 cords, but I didn't measure it, as it was scattered over quite a space. After the property was turned over to the men by me, the Russian Mining Company didn't go

back to the property any more, but picked up and left and the men went into possession immediately.

UPON FURTHER REDIRECT EXAMINATION
BY MR. CLARK:

Q. The Russian Mining Company were still around there during that day?

A. Some of them were, and some of them were not.

Q. The reason why the provisions were taken out of the house was because the men were eating it up. Isn't that a fact?

A. I don't know anything about that.

Q. You don't know anything about what happened afterward.

A. They were there I know when Courtney came down, and he nailed up the place. He put an attachment on the house, and I went to him afterwards and asked him what he was attaching that for, and he went and saw Metzger, and Metzger told him to take his attachment off the house. And in the afternoon they took the provisions away. I saw that. I was working right there.

MR. CLARK: That is all.

MR. CLEGG: That is all.

MR. CLEGG: These documents that are attached to the deposition are the same documents that have been already introduced. That is our case.

PLAINTIFFS REST

MR. CLARK: I desire to make a motion, and I do not know whether the court wants it made in

the presence of the jury.

THE COURT: Has the defense any objection?

MR. CLEGG: No objection.

MR. CLARK: At this time we ask the court for a nonsuit, or directed verdict of the jury, directing them to bring in a verdict in favor of the defendants for the reason that the plaintiffs have absolutely failed to prove the allegations of their complaint or to prove the facts that were absolutely necessary to be proven in order to entitle them to the relief demanded in the complaint, particularly as follows: That it was incumbent upon the plaintiffs in this case to show that they had title to the wood and this other property described in the bill of sale at the time the attachment was levied by the United States Marshal. The evidence, as it has been presented up to the present time, shows that about 12 o'clock on the 11th day of June, 1912, the United States Marshal, acting through his special deputy, came down and attached all of the property situated on the ground, including the property that is included in the Ward so-called bill of sale, and a lot of other property. The testimony further shows that they owed Ward \$1250.00; \$1000 on the option on the machinery, and \$250. in addition to that; that Ward, for some reason—he doesn't state exactly why—demanded that they give him security, as there were to be some attachments levied or something of that kind. That they then gave Ward a bill of sale, so-called of this machinery and the wood for \$1250. Ward's testimony further shows that when he took

his machinery back, that there was only \$250. due him; and admits in his direct and in cross examination that that was merely taken as a mortgage to secure his claim, and that he would turn the property back immediately upon them paying him the amount of money due him and that he merely held it as security. He admits it was a mortgage. He was not in possession, and never was in possession; the Russian Mining Company remained in possession at all times. Therefore, as a bill of sale, it was absolutely void instrument; as a chattel mortgage, it was void as against attaching creditors, because he was not in possession, and it had no affidavit of bona fides, and was not executed according to the provisions of the Codes of Alaska relative to the execution of chattel mortgages. Therefore, when it comes down to the morning of June 11, 1912, all in the world that Ward could possibly have was a chattel mortgage for \$250., but a chattel mortgage that was absolutely void; and, as he testifies, he turned over what interest he had and no more; he merely assigned his interest in that to these laborers., and they never took possession or put up any notices. When the marshal came there, he found the Russian Mining Company still there in possession; therefore, when the attachments were levied, we were entitled to the possession. We, therefore, contend that they have absolutely failed to prove the most essential element of their complaint, to-wit: that they had a title to that property, and had the right to the possession of it. They have failed to prove that, and we therefore

ask the court to grant a nonsuit or a directed verdict, whichever is proper under the practice; I think probably it is a directed verdict, and I ask the court at this time to do that.

THE COURT: Do I understand that you rest your case now?

MR. CLARK: No. We move for a nonsuit on the ground of the failure of the plaintiffs to make out their case.

THE COURT: Do you want to be heard in the matter.

MR. CLARK: Yes. (Argument)

THE COURT: The motion is denied.

MR. CLARK: Note an exception.

THE COURT: Exception allowed.

MR. CLARK: We desire to reserve the right to renew our motion to strike out certain portions of the testimony, before the case is submitted to the jury.

THE COURT: Yes.

SAMUEL R. WEISS, a witness for defendants, upon being first duly sworn, testified in substance as follows, UPON DIRECT EXAMINATION BY MR. McGOWAN:

My name is Samuel R. Weiss; I am the duly appointed Commissioner residing at Chatanika, Fairbanks Precinct, Alaska, and have been for three years and two months, and was such Commissioner during the year 1912. (Hands paper to witness and asks if that is his signature and seal). That is my

signature and seal; I know what those papers are.

(Defendants then offered in evidence certified copy of what purported to be a full and complete record of the suit commenced in Commissioner's Court, 4th Division, Territory of Alaska, entitled J. E. Barrack, plaintiff, vs. Russian Mining Company, defendant, being No. 43, commencing with the complaint, setting up the bond, undertaking on attachment, the summons, the execution, and the sale and the various returns.

OBJECTION by plaintiffs and the said instruments were admitted over the objections of plaintiffs and marked Defendants' Exhibit A, and are in the words and figures as follows; to-wit:

"In the Commissioner's Court for the Fourth Division, Territory of Alaska.

J. E. Barrack vs. Russian Mining Co.

MARSHAL'S RETURN ON EXECUTION.

I HEREBY CERTIFY AND RETURN, that I received the annexed writ of Attachment on the 24th day of June 1912, and that on the 26th day of June 1912 I duly executed the same by offering for sale at public auction the personal property heretofore attached in said cause, said offer made by posting a notice of the time and place of sale, in three public places within five miles of the place where said sale was to take place, to wit:—

One on the boiler house of the above named Defendants on Discovery Claim Chatanika Flats; one on the Post Office at Cleary; and one at the Town of Chatanika, all of said places being in the Fairbanks

Precinct, Territory of Alaska. And that on the 9th day of July 1912, at 10 o'clock A. M. at the boiler house on Discovery Claim Chatanika Flats, being the time and place appointed for said sale, I did at the request of the plaintiff, J. E. Barrack, by public proclamation, then and there made, postpone said sale until July 16th 1912, at 10 o'clock A. M. of said day; and on the 16th day of July 1912, at 10 o'clock of said day, at the same place I did at the request of the plaintiff, J. E. Barrack, again postpone in like manner the said sale until July 23rd 1912, at 10 o'clock A. M. at the same place; that on the 23rd day of July 1912, at 10 o'clock A. M. I did offer for sale and did sell, to the highest and best bidders, for cash, all of the right, title and interest of the above named Defendants, Russian Mining Co. in and to certain personal property, more fully described as follows, to-wit:—

To J. E. Barrack for Five Hundred Fifty Five Dollars \$(555.00) about 75 cords, more or less, of wood—I Hoist, double cylinder—I Boiler 18 HP I carrier—I bucket—I trolley cable— 6 shovels— 4 picks— 8 point hoses—12 ft. pick steel— 10 ft. 5-8 iron— 18 ft. 1 in. pipe— 4 gal. benzine oil— 5 gal. red oil—I hack saw— I jack plane— I small hand drill— and to Paul Ringseth for One Hundred Twelve Dollars (\$112.00) 36 dinner plates 8 meat plates— 30 knives and forks—30 table spoons—30 tea spoons— 12 soup bowls— 30 tea cups— 30 saucers— 2 large meat trays— 2 mixing pans— 2 dish pans— I tea pot— I coffee pot— 2 large meat pots— I flour seive— I

syrup cup— 1 bread knife— 145 lbs. beef— 1 lbs. coffee— 5 lbs. baking powder— 1 lb. tea— 6 1 gal cans apples— 18 cans tomatoes— 14 cans beets— 25 lb. box dried apples— 3-4 box Ivory soap, small size— 3 sacks rolled oats, 9-s-18 cans fig pudding— 150 lbs bayo beans— 40 lbs. small white beans— 16 pcs. Bacon— 5 lbs. split peas— $\frac{1}{2}$ gal. molasses— 27 cans cream— about 15 lbs. sugar 26 pkgs. corn starch— 50 lbs. flour— 17 cans of tomatoes— 6 cans olive oil, $\frac{1}{2}$ gals. 28 cakes Armours white soap 11 cans pumpkin— 5 lbs. salt— 3 cans beets— 7 cans tomatoe eatsup— 1 gals.— part can of coffee about 15 lbs. 1 box caldles—

Dated at Fairbanks, Alaska, this 26th day of July, 1912.

H. K. LOVE, U. S. Marshal

By S. B. Waite, Deputy.

Marshal's Fees \$28.46 Mileage \$49.20

In the Justice's Court for the Territory of Alaska,
Fourth Division, Fairbanks Precinct.

J. E. Barrack Plaintiff vs. Russian Mining Co. Defendant. Execution.

The President of the United States of America,
to the Marshal of Said Division and Territory, or any
Deputy, Greeting:

Whereas, J. E. Barrack, of Fairbanks, Alaska, has recovered judgment against the Russian Mining Co. in the Justice's Court for the Fairbanks Precinct, said Division and Territory, on the 18th day of June 1912, for the sum of Four Hundred and seventy 22-100 Dollars, with interest thereon at the rate of eight per

cent per annum until paid, and costs of suit, amounting to twenty two and 70-100 dollars

Therefore, In the name of the United States of America, you are hereby commanded to levy upon, seize and take into execution the personal property of the said Russian Mining Co. At Chatanika, Alaska in your Division of said District sufficient,, subject to execution, to satisfy said Judgment, interest and increased interest, costs and increased costs, and make sale thereof according to law, and make return of this writ within thirty days from the date hereof.

Herein fail not, and have you then and there this writ.

Witness my hand and the seal of said Court hereto affixed this 21st day of June A. D. 1912

(SEAL)

SAMUEL R WEISS,

Commissioner and Ex Officio Justice of the Peace.

July 9, 1912. To the U. S. Marshal 4 Div. Please postpone sale of personal property in within case until 16th July 1912

McGOWAN & CLARK,

Attys for Plaintiff.

July 16th 1912 To the U. S. Marshal 4th Div. Please postpone sale of the personal property in within case to July 23, 1912.

McGOWAN & CLARK,

Attys for Plaintiff.

4th Div. Dist of Alaska Received Jun 27, 1912
Office of U. S. Marshal Fairbanks, Alaska. Marshal's Docket No. 3875 Writ docketed June 27 1912
Return docketed.....191...

(Indorsed): Filed Aug. 1st 1912. Samuel R. Weiss
Commissioner

1 Hoist, double cylinder, 1 Boiler, 18 H. P. 1 Carrier 1 Bucket 1 Trolley Cable 100 cords (more or less) Wood, 6 Shovels, 4 Picks, 8 Point Hoses, 12 ft. Pick Steel, 10 ft. 5-8 Iron, 18 ft. 1 inch Pipe, 4 gal. Benzine Oil, 5 gal. Red Oil, 1 Hack Saw, 1 Jack Plane, 1 Small Hand Drill. 36 Dinner Plates, 8 meat Plates, 30 Knives and Forks, 30 Table and Tea spoons, 12 Soup Bowls, 30 Tea Cups, 30 Saucers, 2 Large Meat Trays, 2 Mixing Pans, 2 Dish Pans, 1 Tea Pot, 1 Coffee Pot, 2 Large Meat Pots, 1 Flour Sieve, 1 Syrup Cup, 1 Bread Knife.

No.Justice's Court. J. E. Barrack vs.
Russian Mining Co.

Office of the Marshal,

Fourth Division, Territory of Alaska

Chatanika Alaska June 11, 1912.

To C. H. Ward: You will please take notice, that all moneys, goods, credits, effect, debts due or owing, and all other personal property in your possession, or under your control, belonging to the defendant named in the writ, of which the annexed is a copy, are attached by virtue of said writ; and you are hereby notified not to pay over, transfer, deliver, or in any way part with same to anyone but myself.

Please furnish a statement.

R. M. COURTNEY

Special Officer.

Chatanika Alaska June 11 1912 2:30 P. M.

I have nothing of any nature whatsoever belonging

to the above Russian Mining Co.

C. H. WARD.

Special Officer's Fees \$4.00.

In the Justice's Court for Fairbanks Precinct,
Fourth Judicial Division Territory of Alaska.

Before SAMUEL R. WEISS, Commissioner and
ex-officio Justice of the Peace.

J. E. Barrack Plaintiff, vs. Russian Mining Co.,
Defendants. Special Officer's Return on Writ of At-
tachment.

United States of America

Territory of Alaska

Fourth Division ss.

I HEREBY CERTIFY AND RETURN that I re-
ceived the annexed writ of Attachment on the 11th
day of June, 1912, at the hour of 15 minutes past
one o'clock in the afternoon, and that I executed the
same on the same 11th day of June, 1912, at the
hour of 30 minutes past one o'clock in the afternoon;

By delivering a copy thereof duly certified by me
to Nick Chaloff, one of the members of the firm of
the Russian Mining Co., at Chatanika, Alaska, and
by attaching all the right, title and interest of the
above named defendants in and to one lot of wood,
one boiler house and all the machinery contained
therein and in the mine of the said defendants or
on the surface of said mine, and one mess house to-
gether with all provisions, ranges, cooking utensils
contained therein, all being situated on Discovery
Claim, Chatanika River, in the Fairbanks Mining
and Recording District, Territory of Alaska.

Dated at Chatanika, Alaska, this 11th day of June, 1912.

R. M. COURTNEY

Special Officer.

Special Officer's Fees, \$4.00

In the Commissioner's Court for Fairbanks Precinct, Fourth Division, Territory of Alaska.

J. E. Barrack Plaintiff vs. Russian Mining Co.
Defendant No. 43—Writ of Attachment.

The President of the United States of America,
To the Marshal of the Territory of Alaska, Fourth Division, or to his Deputy, Greeting:

Whereas, J. E. Barrack hath complained that Russian Mining Co. is justly indebted to him to the amount of Five hundred seventy & 20-100 Dollars and cents and the necessary affidavit and undertaking herein having been filed as required by law.

We Therefore Command You, That you attach and safely keep all the personal property of the said defendant not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, as above stated, to be found in your Division of said Territory, and as shall be of value sufficient to satisfy the said debt and the costs and disbursements of the said plaintiff herein. And of this writ make due service and return.

Given under my hand and official seal this 11 day of June 1912

(SEAL)

SAMUEL R. WEISS

Commissioner and ex officio Justice of the Peace.

I hereby appoint R. M. Courtney special officer to serve above writ.

SAMUEL R. WEISS,

Commissioner & ex officio Justice of the Peace.

(Indorsed): Returned and filed this 12th day of June 1912. Samuel R. Weiss, Commissioner and ex officio Justice of the Peace.

In the Commissioner's Court for Fairbanks Precinct, Fourth Division, Territory of Alaska.

J. E. Barrack Plaintiff vs. Russian Mining Co. Defendant. No. 43.—Summons.

To the United States Marshal of the Territory of Alaska, or any Deputy:

In the name of the United States of America, we command you to summon Russian Mining Co. to appear before me the undersigned, a Justice of the Peace in Fairbanks Precinct in said Territory, on the eighteenth day of June 1912 at the hour of three o'clock in the afternoon of said day at my office in the Court House at Chatanika in the said precinct, to answer the complaint of J. E. Barrack founded upon account and wherein he demands 570.22 Dollars.

Given under my hand and official seal this 11 day of June 1912.

(SEAL)

SAMUEL R. WEISS

Commissioner and ex officio Justice of the Peace.

I hereby appoint R. M. Courtney Special Officer to serve above summons.

SAMUEL R. WEISS,

Commissioner & Ex officio Justice of the Peace.
Territory of Alaska,

Fourth Division.

Fairbanks Precinct. ss.

I, R. M. Courtney, Special officer of the Territory of Alaska, Fourth Division, do hereby certify that I received the within summons on the 11th day of June 1912, and on the 11th day of June 1912, I duly served the same upon Nick Chaloff at Chatanika, in said precinct, by delivering a true copy thereof with a copy of the complaint in said action, prepared and certified by S. R. Weiss, Com'r to Nick Chaloff, a member of the defendant firm Russian Mining Co. in Fairbanks Precinct, Territory of Alaska.

Dated at Chatanika, Alaska this 11th day of June 1912

R. M. COURTNEY

Special Officer.

(Indorsed): In the Commissioner's Court, Territory of Alaska Fourth Division Fairbanks Precinct. J. E. Barrack Plaintiff vs. Russian Mining Co. Defendant. SUMMONSAttorneys for Plaintiff. Returned and filed this 12th day of June, 1912. Samuel R. Weiss. Commissioner and ex officio Justice of the Peace.

In the Justice's Court for the Territory of Alaska, Fourth Division, Fairbanks Precinct.

J. E. Barrack Plaintiff vs. Russian Mining Co. Defendant.

Undertaking for Attachment

Whereas, the above named plaintiff has commenced an action in the above entitled court to recover from the above named defendants the sum of Five hundred

seventy & 22-100 Dollars (\$570.22), on a contract for the direct payment of money and is desirous that a writ of attachment issue out of said court against property of the said defendants.

Now, Therefore, we, J. E. Barrack as principal, and ... and ... as sureties, in consideration of the issuance of said writ of attachment, do hereby jointly and severally promise and undertake in the sum of six hundred Dollars (\$600.00), that the plaintiff above named will pay all costs that may be adjudged to the above named defendants and all damages that they may sustain by reason of such attachment, if the same be wrongful or without sufficient cause, not exceeding the sum of \$600.00

In Witness Whereof we have hereunto set our hands and seals this 11th day of June, A. D., 1912.

J. E. BARRACK Seal.

C. E. DANFORTH Seal.

JOHN METZGER Seal.

United States of America,

Territory of Alaska

Fairbanks Precinct. ss.

C. E. Danforth and John Metzger being severally duly sworn, depose and say, each for himself: That he is a surety on the foregoing undertaking; that he is a resident within the Territory of Alaska; that he is not a counselor, or attorney-at-law, marshal, deputy marshal, clerk, commissioner, or other officer of any court, and that he is worth the sum of \$600.00 over and above all debts and liabilities in property not exempt from execution.

C. E. DANFORTH
JOHN METZGER

Subscribed and sworn to before me on this 11 day
of June A. D., 1912.

(SEAL)

SAMUEL R. WEISS,

A Notary Public in and for the Territory of Alaska.
Commissioner and ex officio Justice of the Peace.

(Indorsed): Filed this 11th day of June 1912.
Samuel R. Weiss, Commissioner.

In the Justice's Court for the Territory of Alaska,
Fourth Division, Fairbanks Precinct.

J. E. Barrack Plaintiff vs. Russian Mining Co. De-
fendant. No.— Affidavit for Attachment.

United States of America,

Territory of Alaska

Fairbanks Precinct. ss.

M. R. BOYD being duly sworn deposes and says:
That he is the authorized agent of the plaintiff in
the above entitled action, and makes this affidavit
for the purpose of securing the issuance of a writ of
attachment herein against the property of the said
defendants; that the defendants above named are in-
debted to the above named plaintiff in the sum of Five
hundred seventy 22-100 (\$570.22) Dollars, over and
above all legal set offs and counterclaims upon an
account contract for the direct payment of money, to-
wit: goods and merchandise furnished during months
of Feby to June 1912 inclusive that the payment of
the same has not been secured by any mortgage, lien,
or pledge upon real or personal property; that said
sum for which an attachment is asked in the above

entitled action, an actual, bona fide existing debt, due and owing from the said defendants to the said plaintiff, and that such attachment is not sought nor this action prosecuted to hinder, delay, or defraud any creditor or creditors of said defendant.

M. R. BOYD, Agent

Subscribed and sworn to before me on this 11 day of June A. D. 1912.

(SEAL)

SAMUEL R. WEISS

A Notary Public in and for the Territory of Alaska.

(Indorsed): Filed this 11th day of June 1912.
Samuel R. Weiss, Commissioner.

In the Justice's Court of the Territory of Alaska, Fourth Division, Fairbanks Precinct, Before Samuel R. Weiss, Commissioner and ex officio Justice of the Peace.

J. E. Barrack, Plaintiff, vs. Russian Mining Co., defendants. S. S.

Plaintiff states:

1. That defendants are now and have been, during all times hereinafter mentioned, a copartnership operating a lay on Dis. Claim, Chatanika, said Territory under the firm name as herein mentioned.

2nd. That during the months of Feby to June 1912 inclusive, plaintiffs sold and delivered to defendants goods and merchandise to the value of \$622.20 and that same is now due and remains wholly unpaid except the sum of \$50.00.

Wherefore plaintiff demands judgment in the sum of \$570.22 with costs of ths action.

J. E. BARRACK,

By M. R. BOYD, Agt.

Territory of Alaska

Fourth Division

Fairbanks Precinct ss.

M. R. Boyd being sworn says: That he is the agent of plaintiff,, has read foregoing complaint, and that same is true to the best of his knowledge and belief.

M. R. BOYD.

Subscribed and sworn to before me this 11 day of June 1912.

(SEAL)

SAMUEL R. WEISS,

Commissioner and ex officio Justice of the Peace.

(Indorsed): J. E. Barrack vs. Russian Mining Co.
Filed this 11th day of June, 1912. Samuel R. Weiss
Commissioner.

In the Justice's Court for Fairbanks Precinct Territory of Alaska Fourth Division before Samuel R. Weiss, Commissioner and Ex Officio Justice of Peace at Chatanika. . .

J. E. BARRACK Plaintiff vs. Russian Mining Co.
No. 43.

June 11 On the 11th day of June 1912 J. E. Barrack filed a complaint against the Russian Mining Co. defendants alleging that the defendants are justly indebted to him in the sum of Five Hundred and seventy 22-100 Dollars.

June 11 I have appointed R. M. Courtney Special Officer to serve the within process

June 11 Summons issued to Special Officer requiring The Russian Mining Co. to make answer on or before the 18th of June at the hour of three

o'clock in the afternoon of said day.

June 11 Affidavit for Attachment taken and filed.

June 11 Undertaking for Attachment taken and filed

June 11 Writ of Attachment issued to Special Officer R. M. Courtney.

June 11 Summons returned and filed endorsed as follows:

Territory of Alaska

Fourth Division

Fairbanks Precinct ss.

I. R. M. Courtney, Special officer of the Territory of Alaska Fourth Division do hereby certify that I received the within summons on the 11th day of June 1912 and on the 11th day of June 1912 I duly served the same upon Nick Chaloff at Chatanika in said precinct by delivering a true copy thereof together with a copy of the complaint in said action prepared and certified by S. R. Weiss, Com'r., to Nick Chaloff in Fairbanks precinct Territory of Alaska. Dated at Chatanika Alaska this 11th day of June 1912.

R. M. COURTNEY

Special Officer

June 11 Writ of Attachment returned with Special Officer endorsement thereon as follows:—

I hereby certify and return that I received the within writ of Attachment on the 11th of June 1912. at the hour of 15 minutes past one o'clock in the afternoon and that I executed the same on the same 11th day of June 1912 at the hour of 30 minutes past one o'clock in the afternoon, by delivering a copy

thereof duly certified by me to Nick Chaloff one of the members of the firm of the Russian Mining Co., at Chatanika Alaska and by attaching all the right title and interest of said defendants in and to one lot of wood one boiler house and all the machinery contained therein and in the mine of the said defendants or on the surface of said mine and one mess house together with all provisions, ranges, cooking utensils contained therein all being situated on Discovery Claim, Chatanika River in the Fairbanks Mining & Recording District, Territory of Alaska.

Dated at Chatanika Alaska this 11th day of June 1912

June 18

R. M. COURTNEY

Special Officer.

June 18 This case came up regularly for trial on this 18th day of June 1912 at three o'clock in the afternoon Plaintiff present; defendants absent, so case went by default. Therefore it is adjudged and ordered that J. E. Barrack do have and recover of and from the Russian Mining Co. Five Hundred seventy 22-100 Dollars with interest at 8 per cent per annum until paid and costs taxed at \$22.70.

Let execution issue.

SAMUEL R. WEISS,

Commissioner & Ex officio Justice of Peace

June 21 Execution issued to J. E. Barrack.

Territory of Alaska

Fairbanks Precinct ss.

I, Samuel R. Weiss, United States Commissioner

and ex officio Justice of the Peace in and for the Fairbanks Precinct, Territory of Alaska, residing at Chatanika therein, do hereby certify that the within and foregoing is a full, true, and correct copy of the docket entries (as the same appear on the Civil Docket of my Court) and of the original papers (on file in my office) in cause No. 43, entitled J. E. Barrack, plaintiff, vs. Russian Mining Company, defendant, in the Justice's Court for said Precinct, at Chatanika, Alaska.

Witness my hand and official seal on this 9th day of December, 1912.

(SEAL)

SAMUEL R. WEISS

United States Commissioner and ex officio Justice of the Peace.

(Indorsed): No. 43 JUSTICE'S COURT, CHATANIKA J. E. Barrack vs. Russian Mining Company. Certified copy of original papers and docket entries. No. 1799 Defts Ex "A" Filed In the District Court Territory of Alaska, 4th Div. Nov 13, 1913. Angus McBride, Clerk. By P. R. Wagner, Deputy.

Defendants then offered in evidence certified copies of the records of Commissioner Weiss in case No. 44, entitled in the Justice's court at Chatanika, C. E. Danforth vs. Russian Mining Company, J. E. Barrack, assignee, which papers were identified by Commissioner Weiss as being certified copies of the originals.

Plaintiffs objected and said instruments were admitted over the objections of plaintiffs and marked Defendants' Exhibit B, and are in the words and

figures as follows, to-wit:

"In the Commissioner's Court for the Fourth Division, Territory of Alaska.

C. E. Danforth J. E. Barrack, Assignee, vs. Russian Mining Co. Marshal's Return on Execution.

I HEREBY CERTIFY AND RETURN, that I received the annexed Writ of Execution on the 26th day of June 1912, at Chatanika, Alaska; and that on the same day I duly executed the same by levying upon certain personal property of the above named defendants, Russian Mining Co. for a more accurate description of which I refer to the return on the case of J. E. Barrack vs. Russian Mining Co.; by posting a notice of the time and place of sale in three public places within five miles of the place where said sale was to take place, to wit: one on the boiler house of the above named Defendants on Discovery Claim Chatanika Flats one on the Post Office at Cleary; and one at the Town of Chatanika; all of said places being in the Fairbanks Precinct, Territory of Alaska. And that on the 9th day of July 1912, at 11 o'clock A. M. at the boiler house on Discovery Claim Chatanika Flats, being the time and place appointed for said sale, I did at the request of J. E. Barrack, Assignee, by public proclamation, then and there made, postpone said sale until July 16th. 1912, at 11 o'clock A. M. of said day; that on the 16th day of July 1912, at 11 o'clock of said day, at the same place I did at the request of J. E. Barrack, Assignee, in like manner again postpone the said sale until the 23rd day of July 1912, at 11 o'clock of said day at the same place;

that on July 23rd 1912 all of said personal property was sold on the prior Execution of J. E. Barrack vs. Russian Mining Co. and after said prior Execution of J. E. Barrack vs. Russian Mining Co. was fully satisfied, there was found a balance of Ninety and 60-100 Dollars (\$90.60) which is hereby applied to the satisfaction of the execution annexed.

Dated at Fairbanks, Alaska, July 27th. 1912.

H. K. LOVE, U. S. Marshal.

By S. B. Waite, Deputy.

Marshal's Fees \$4.00 Mileage 13.20

In the Justice's Court for the Territory of Alaska,
Fourth Division. Fairbanks Precinct.

C. E. Danforth Plaintiff vs. Russian Mining Co.
Defendant. No.— Execution.

The President of the United States of America,
To the Marshal of Said Division and Territory, or
any Deputy, Greeting:

WHEREAS, C. E. Danforth of Fairbanks Precinct, Territory of Alaska recovered judgment against Russian Mining Co., of Chatanika, Alaska, in the Justice's Court for the Fairbanks Precinct, said Division and Territory, on the 18th day of June, 1912, for the sum of Four hundred and thirty seven 55-100 Dollars, with interest thereon at the rate of eight per cent. per annum until paid, and costs of suit, amounting to twenty two 70-100 Dollars.

THEREFORE, in the name of the United States of America, you are hereby commanded to levy upon, seize and take into execution the personal property of the said Russian Mining Co. in your Division of

said District sufficient, subject to execution, to satisfy said Judgment, interest and increased interest, costs and increased costs, and make sale thereof according to law, and make return of this writ within thirty days from the date hereof.

Herein fail not, and have you then and there this writ.

Witness my hand and the seal of said court hereto affixed this 21st day of June A. D. 1912.

(SEAL)

SAMUEL R. WEISS

Commissioner and Ex Officio Justice of the Peace.

(Indorsed): 4th Div. Dist of Alaska Received June 27 1912 Office of U. S. Marshal Fairbanks, Alaska. Marshal's Docket No. 3876. Writ docketed June 27, 1912. Return docketed...191... No... Justice's Court Territory of Alaska Fourth Division. C. E. Danforth Plaintiff vs. Russian Mining Co. Defendant. EXECUTION Filed Aug 1st, 1912. Samuel R. Weiss Commissioner.

NO.....JUSTICE'S COURT.

C. E. DANFORTH vs. RUSSIAN MINING CO.

Office of the Marshal,

Fourth Division, Territory of Alaska.

Chatanika Alaska June 11 1912.

To C. H. WARD

You will please take notice, that all moneys, goods, credits, effects, debts due or owing, and all other personal property in your possession, or under your control, belonging to the defendant named in the writ, of which the annexed is a copy, are attached by virtue of said writ; and you are hereby notified not

to pay over, transfer, deliver, or in any way part with same to anyone but myself.

Please furnish a statement

R. M. COURTNEY

Special Officer.

Chatanika Alaska June 11 1912 2:30 P. M.

I have nothing of any nature whatsoever belonging to the above Russian Mining Co.

C. H. WARD

Special Officer's Fees \$4.00

In the Justice's Court for Fairbanks Precinct, Fourth Division. Territory of Alaska.

Before SAMUEL R. WEISS, Commissioner and ex-officio Justice of the Peace.

C. E. Danforth Plaintiff, vs. Russian Mining Co., Defendants. Special Officer's Inventory of Merchandise taken under Writ of Attachment.

I HEREBY CERTIFY and return that the following is a full, true and correct statement and inventory of the groceries only attached by me in pursuance of the Writ of attachment issued in the above entitled action on the 11th day of June, 1912, and now held by me subject to the order of the above Court:

145 lbs. Beef (cold storage) 10 lbs. Coffee, 5 lbs. Baking Powder, 1 lb. Tea, 6 1-gal. cans Apples, 18 cans Tomatoes, 14 cans Beets, 25 lb. box Dried Apples, $\frac{3}{4}$ bx. Ivory Soap, small size, 3, sx. Rolled Oats 9's, 18 cans Fig Pudding, 150 lbs Bayo Beans, 40 lbs. Small White Beans, 16 pcs. Bacon, 5 lbs. Split Peas, 1.2 Gal. Molasses, 27 cans Cream, About

15 lbs. Sugar, 26 pkgs. Corn Starch, 50 lbs. Flour, 17 cans Tomatoes, 6 cans Olive Oil, $\frac{1}{2}$ Gals 28 cakes Armour's White Soap, 11 cans Pumpkin, 5 lbs. Salt, 3 cans Beets, 7 cans Tomato Catsup, 1 gals., Part can Coffee, about 15 lbs., 1 Box Candles.

Dated at Chatanika, Alaska, this 11th day of June, 1912.

R. M. COURTNEY

Special Officer.

In the Justice's Court for Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska.

Before Samuel R. Weiss, Commissioner and ex-officio Justice of the Peace.

C. E. Danforth Plaintiff, vs. Russian Mining Co., Defendants. Special Officer's Return on Writ of Attachment.

United States of America

Territory of Alaska

Fourth Division ss.

I HEREBY CERTIFY AND RETURN that I received the annexed writ of Attachment on the 11th day of June, 1912, at the hour of 20 minutes past one o'clock in the afternoon, and that I executed the same on the same 11th day of June, 1912, at the hour of 40 minutes past one o'clock in the afternoon;

By delivering a copy thereof duly certified by me to Nick Chaloff, one of the members of the firm of the Russian Mining Co., at Chatanika, Alaska, and by attaching all the right, title and interest of the above named defendants in and to one lot of wood, one boiler house and all the machinery contained

therein and in the mine of the said defendants or on the surface of said mine, and one mess house together with all provisions, ranges, cooking utensils contained therein, all being situated on Discovery Claim, Chatanika River, in the Fairbanks Mining and Recording District, Territory of Alaska.

Dated at Chatanika, Alaska, this 11th day of June, 1912.

R. M. COURTNEY

Special Officer.

Special Officer's fees, \$4.00.

In the Commissioner's Court (Chatanika) for Fairbanks Precinct, Fourth Division, Territory of Alaska.

C. E. Danforth Plaintiff vs. Russian Mining Co. Defendant. No. 44. Writ of Attachment.

The President of the United States of America, To the Marshal of the Territory of Alaska, Fourth Division, or to his Deputy, Greeting:

WHEREAS, C. E. Danforth hath complained that Russian Mining Co. is justly indebted to him to the amount of Four hundred thirty seven Dollars and fifty cents and the necessary affidavit and undertaking herein having been filed as required by law.

WE THEREFORE COMMAND YOU, That you attach and safely keep all the personal property of the said defendant not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, as above stated, to be found in your Division of said Territory, and as shall be of value sufficient to satisfy the said debt and the costs and disbursements of said plaintiff herein. And of this

writ make due service and return.

Given under my hand and official seal this 11th day of June 1912.

(SEAL) SAMUEL R. WEISS

Commissioner and ex officio Justice of the Peace.

I hereby appoint R. M. Courtney Special Officer to serve above writ.

SAMUEL R. WEISS

Commissioner and ex officio Justice of the Peace.

(Indorsed): Returned and filed this 12th day of June 1912. Samuel R. Weiss, Commissioner and ex officio Justice of the Peace.

In the Commissioner's Court for Fairbanks Precinct, Fourth Division, Territory of Alaska.

C. E. Danforth Plaintiff vs. Russian Mining Co. Defendant. No. 44. Summons.

To The United States Marshal of the Territory of Alaska, or any Deputy:

In the name of the United States of America, we command you to summon Russian Mining Co. to appear before me the undersigned, a Justice of the Peace in Fairbanks Precinct in said Territory, on the 18th day of June 1912 at the hour of 4 o'clock in the afternoon of said day at my office in the Court House at Chatanika in the said precinct, to answer the complaint of C. E. Danforth founded upon account and wherein he demands four hundred thirty seven & 50-100 Dollars.

Given under my hand and official seal this 11th day of June 1912.

(SEAL) SAMUEL R. WEISS

Commissioner and ex officio Justice of the Peace.

I hereby appoint R. M. Courtney special officer to serve above summons. SAMUEL R. WEISS

Commissioner & ex officio Justice of the Peace.
Territory of Alaska,
Fourth Division
Fairbanks Precinct ss.

I, R. M. Courtney, special officer of the Territory of Alaska, Fourth Division, do hereby certify that I received the within summons on the 11th day of June 1912, and on the 11th day of June 1912 I duly served the same upon Nick Chaloff at Chatanika in said precinct, by delivering a true copy thereof together with a copy of the complaint in said action, prepared and certified by S. R. Weiss, Com'r, to Nick Chaloff, one of the members of the firm of Russian Mining Co. in Fairbanks Precinct, Territory of Alaska.

Dated at Chatanika, Alaska this 11th day of June 1912.

R. M. COURTNAY Special Officer

(Indorsed): No.— In the Commissioner's Court Territory of Alaska Fourth Division, Fairbanks Precinct. C. E. Danforth Plaintiff vs. Russian Mining Co Defendant Summons. Returned and filed this 12th day of June 1912 SAMUEL R. WEISS Commissioner and ex officio Justice of the Peace.

In the Justice's Court for the Territory of Alaska, Fourth Division, Fairbanks Precinct.

C. E. Danforth Plaintiff vs Russian Mining Co. Defendant. No.— Undertaking for Attachment.

WHEREAS, the above named plaintiff has commenced an action in the above entitled court to recover from the above named defendants the sum of Four hundred thirty seven & 50-100 (\$437.50) Dollars, on a contract for the direct payment of money and is desirous that a writ of attachment issue out of said court against property of the said defendants.

NOW, THEREFORE, we C. E. Danforth as principal, and M. R. Boyd and John Metzger as sureties, in consideration of the issuance of said writ of attachment, do hereby jointly and severally promise and undertake in the sum of Four hundred fifty Dollars \$(450.00), that the plaintiff above named will pay all costs that may be adjudged to the above named defendants and all damages that they may sustain by reason of such attachment, if the same be wrongful or without sufficient cause, not exceeding the sum of \$450.00

IN WITNESS WHEREOF we have hereunto set our hands and seals this 11th day of June, A. D., 1912.

M. R. BOYD Seal.

JOHN METZGER Seal.

United States of America,

Territory of Alaska

Fairbanks Precinct. ss.

M. R. Boyd and John Metzger being severally duly sworn, depose and say, each for himself: That he is a surety on the foregoing undertaking; that he is a resident within the Territory of Alaska; that he is not a counselor, or attorney-at-law, marshal, depu-

ty marshal, clerk, commissioner, or other officer of any court, and that he is worth the sum of \$500.00 over and above all debts and liabilities in property not exempt from execution.

M. R. BOYD

JOHN METZGER

Subscribed and sworn to before me on this 11th day of June A. D., 1912.

(SEAL)

SAMUEL R. WEISS

A Notary Public in and for the Territory of Alaska.

Commissioner and ex officio Justice of the Peace.

(Indorsed:) Filed this 11th day of June, 1912.
Samuel R. Weiss, Commissioner.

In the Justice's Court for the Fairbanks Precinct
Territory of Alaska, Fourth Division.

C. E. Danforth Plaintiff vs. Russian Mining Co.
Defendant. No.— Affidavit for Attachment.

United States of America,

Territory of Alaska

Fairbanks Precinct. ss.

C. E. Danforth being duly sworn deposes and says: That he is the plaintiff in the above entitled action, and makes this affidavit for the purpose of securing the issuance of a writ of attachment herein against the property of the said defendant; that the defendant above named are indebted to the above named plaintiff in the sum of Four hundred thirty seven & 50-100 Dollars, (\$437.50), over and above all legal setoffs and counterclaims upon an account contract for the direct payment of money, to-wit: for medical services rendered the defendants and the as-

signed account of Paul Ringseth for goods and merchandise furnished the defendants. That the payment of the same has not been secured by any mortgage, lien, or pledge upon real or personal property; that said sum, for which an attachment is asked in the above entitled action, is bona fide, an actual, existing debt, due and owing from the said defendants to the said plaintiff, and that such attachment is not sought nor this action prosecuted to hinder, delay, or defraud any creditor or creditors of said defendant.

.....

Subscribed and sworn to before me this 11th day of June A. D., 1912.

(SEAL)

SAMUEL R. WEISS

A Notary Public in and for the Territory of Alaska.
Commissioner and ex officio Justice of the Peace.

(Indorsed): Filed this 11th day of June 1912.
Samuel R. Weiss, Commissioner.

In the Justice Court for Fairbanks Precinct, 4th
Division, Territory of Alaska, Before S. R. Weiss,
Commissioner & Ex Officio Justice of the Peace.

C. E. Danforth, Plaintiff vs. Russian Mining Co.
Dft. Complaint. No.—

For cause of action plaintiff complains and alleges:

1. That the defendants are now and have been during all the times hereinafter mentioned a copartnership operating a lay on Discovery Claim on Chatanika, said Territory, Division & Precinct, under the firm name above mentioned.

2. That during the months of December, 1911, to April 1912, inclusive, this plaintiff furnished defend-

ants, at their request, medical aid, attendance, medicines and supplies to the amount of Two hundred fifty Dollars (\$250.00); that the same is now due and remains wholly unpaid.

3. That on the 11th day of June 1912, for a valuable consideration, this plaintiff became the owner of an account of Paul Ringseth to the amount of One hundred eighty-seven & 50-100 Dollars; that the same is now due and remains wholly unpaid.

Wherefore plaintiff demands judgment for the sum of Four hundred thirty seven & 50-100 Dollars with costs.

DR. C. E. DANFORTH

Territory of Alaska Fairbanks, Precinct—ss.

C. E. Danforth, being first duly sworn on oath, deposes and says: I am the plaintiff in the foregoing complaint named; I have read the same, know the contents thereof, and the same is true as I verily believe.

DR. C. E. DANFORTH.

Subscribed and sworn to before me this 11th day of June 1912.

SAMUEL R. WEISS

Commissioner & ex-officio Justice of the Peace.

(SEAL)

(Indorsed): C. E. Danforth vs Russian Mining Co. Filed this 11th day of June 1912 Samuel R. Weiss Commissioner.

In the Justice's Court for the Fairbanks Precinct
Territory of Alaska Fourth Division Before Samuel
R. Weiss Commissioner & Ex-Officio Justice of
Peace at Chatanika.

C. E. Danforth Plaintiff vs. Russian Mining Co.,
Defendants. No. 44.

June 11 On this 11th day of June 1912 C. E. Danforth filed complaint against the Russian Mining Co., defendants alleging that the defendants were justly indebted to him in the sum of \$437.50-100.

June 11 I have appointed R. M. Courtney Special Officer to serve the within process.

June 11 Summons issued to Special Officer R. M. Courtney requiring that defendants make answer on or before the 18th day of June 1912 at the hour of 2 o'clock in the afternoon of said day.

June 11 Affidavit for Attachment taken and filed.

June 11 Undertaking for attachment taken and filed.

June 11 Writ of attachment issued to Special Officer R. M. Courtney.

Summons returned and filed endorsed as follows:

I, R. M. Courtney, Special Officer of the Territory of Alaska, Fourth Division, do hereby certify that I received the within summons on the 11th day of June 1912, and on the 11th day of June 1912, I duly served the same upon Nick Chaloff at Chatanika in said precinct by delivering a true copy together with a copy of the complaint in said action prepared & Certified by S. R. Weiss, Com'r., to Nick Chaloff in Fairbanks precinct Territory of Alaska.

Dated at Chatanika, Alaska, this 11th day of June 1912.

R. M. COURTNEY, Special Officer.

June 11 Writ of Attachment returned with Special Officer's endorsement thereon as follows:

I hereby certify and return that I received the annexed Writ of Attachment on the 11th of June 1912 at the hour of 20 minutes past one o'clock in the afternoon and that I executed the same at the hour of 40 minutes past one o'clock in the afternoon of same day, by delivering a copy thereof certified by me to Nick Chaloff, one of the members of the firm of the Russian Mining Co. at Chatanika Alaska and by attaching all the right title and interest of said Russian Mining Co. in and to one lot of wood, one boiler house and all the machinery contained therein and in the mine of said defendants or on the surface of said mine and one mess house together with all provisions, ranges, cooking utensils contained therein, all being situated on Discovery Claim Chatanika River in Faibanks Mining & Recording District Territory of Alaska.

Dated at Chatanika Alaska this 11th day of June 1912.

R. M. COURTNAY, Special Officer.

June 18 This case came up regularly for trial on this 18th day of June 1912, at the hour of 2 o'clock in the afternoon. Plaintiffs present. Defendants absent so case went by default. Therefore it is adjudged and ordered that C. E. Danforth do have and recover of and from the Russian Mining Co., defendants, \$437.50-100 with interest at 8 per cent per annum and costs taxed at \$22.70. Let execution issue.

SAMUEL R. WEISS

Commissioner & ExOfficio Justice of Peace.

June 21 Execution issued C. E. Danforth.

Aug 5 Received Thirty four 34-100 Dollars on
above Judgment

JOHN BARRACK.

Territory of Alaska Fairbanks Precinct,—ss

I, Samuel R. Weiss, United States Commissioner and ex officio Justice of the Peace in and for the Fairbanks Precinct, Territory of Alaska, residing at Chatanika therein, do hereby certify that the within and foregoing is a full, true, and correct copy of the docket entries (as the same appear on the Civil Docket of my Court) and of the original papers (on file in my office) in cause No. 44, entitled C. E. Danforth, plaintiff, vs. Russian Mining Company, defendant, in the Justice's Court for said precinct, at Chatanika, Alaska.

Witness my hand and official seal on this 9th day of December, 1912.

SAMUEL R. WEISS

United States Commissioner and ex-officio Justice of the Peace.

(SEAL)

Indorsed: No. 44 Justice's Court, Chatanika, C. E. Danforth vs. Russian Mining Company. Certified copy of original papers & docket entries. No. 1799 Deft's Ex "B" Filed in the District Court Territory of Alaska, 4th Div. Nov 13, 1913, Angus McBride Clerk By P. R. Wagner Deputy."

I know the amount of the wood that was attached in those two suits, Exhibits A and B; I think in the attachment it states there are 75 cords, that was when Mr. Courtney attached it. I have no personal knowl-

edge as I did not go up there. After it was repiled, it could be measured better and it shows 72 cords on the return of the execution, I think it states 72 cords. Mr. Barrack had it repiled before the sale, so that it could be measured more accurately.

Witness Excused.

Upon inquiry by attorneys for defendants, Mr. Clegg, attorney for plaintiffs, stated that the plaintiffs were making no claim to the boiler situate on the ground and described in the complaint.

JOHN BARRACK, a witness for defendant, after being first duly sworn, testified in substance as follows, UPON DIRECT EXAMINATION BY MR. CLARK:

My name is John Barrack. I am familiar with the proceedings in the Chatanika suit, entitled J. E. Barrack vs. Russian Mining Company. J. E. Barrack is my son and the business was conducted in his name in June 1912. On or about the 11th of June and for about eight or nine days thereafter, I was on or about the works of the Russian Mining Company and examined the machinery that was on the ground and was there with it a good deal and I know about the wood and have seen most all of it, in fact.

"Q. What was the first time that you went on there in that neighborhood of the 11th? Was it on that day?

A. I was there that day that Courtney was there, yes.

Q. Were you there when Courtney attached?

A. I was there about ten minutes later.

Q. Where were the men at that time?

A. Most of them were in the bunk house.

Q. In the bunk house?

A. Yes. In the bunk house and the mess house.

Q. Did you look around and see if any notices were up?

A. I didn't see any notices anywhere there.

Q. You were around there for how many days?

A. I was there for eight or nine days.

Q. Were you around in the various buildings?

A. I was around in the buildings. I was looking after some stuff that they had on a lease and option from us, and I was gathering up some of them.

Q. That was other property. A. Yes sir.

Q. Were any of the men that had been working for the Russian Mining Company around the works during the eight or nine days that you were there?

A. They were there when I first went there, and I didn't see any of them there—I think there were two there, two men that I recognized. I didn't know all of them personally. They were around there for two or three days after the attachment.

Q. What were they doing?

A. They didn't appear to be doing anything. "After the wood was attached, I had Smith, of Smith & Durand, pile it up and I paid for it myself. Smith measured it and so did John Durand and I think Paul Ringseth was there at the measuring of it. I was there too. I think there were 72 cords in the pile, I would be very sure between 72 and 75. The wood

was afterwards sold at marshal's sale. It was put up in two lots, there was one lot of it worth more than the other, and I think, if my recollection is correct, that the whole lot of wood brough \$305.00. It was sold at public auction. There was quite an attendance and quite a lot of bidding. In regard to the hoist, it was in pretty bad condition. I have been engaged in the machinery business off and on for about fifty years and have done considerable in the way of buying and selling new and second hand machinery, and am acquainted with the value of such in this section of the country. I know a good deal about it. I have been handling machinery in the north since 1899 and deal very frequently in second hand machinery. From my experience, I would consider that I was a judge of the value of machinery—second-hand machinery, both in buying and selling the same. I examined the hoist that was on the ground on the 11th of June, 1912. Well, that hoist was pretty much on the bum, it was in poor condition. I wouldn't give \$50.00 for a hoist in the condition it was in. Afterwards we brought it to town and fixed it up in good shape and our books show it cost about \$100.00. I would say its value on the ground on the 11th of June would be about \$50.00. I had seen the hoist working before and had helped repair it. I was present once when it stuck and left Serafino hanging in the shaft for at least an hour. It simply couldn't come up and couldn't go down. In regard to the carrier, we sell a carrier like that, in good shape, for \$50.00. The one in question was in

fair shape, worth about \$50.00. The bucket was in poor shape, was worth about \$20.00. The bucket block goes with the carrier. In regard to the cable, I never examined the standing cable. There was no hoisting cable belonging to it, and the standing cable I never examined, but it looked to be in fair condition. I should judge it would be worth about \$50.00. I was there the day the machinery was sold. I bought it myself from the marshal. None of it has been sold since, it is all intact. The wood was sold to John Durand and was burned up. The wood and machinery was sold for \$550., something like that. That included the engine, the hoist, the carrier, the bucket and cable and the boiler also. The articles were not sold separately, just put in a lump and everybody bid on it, and it included the boiler. The price, I think was \$550. or \$560., I do not recollect. The boiler, if it is fit for service, is worth \$225. We sold one just like it for \$225, second hand. Counting the boiler worth \$225. the balance would be worth about \$325. She wouldn't be worth any more than that. There is better machinery sold for less money.

“Q. You say you got there about ten minutes after Mr. Courtney arrived.

A. Yes sir. I meant to come down with him, but I wasn't in time.

Q. About what time in the day was it that he was there?

A. It was before noon sometime, but I can't tell you just to the minute what time it was.

Q. Did you see Mr. Ward around there at that

time? A. No. I didn't see Ward.

Q. Did you see any members of the Russian Mining Company?

A. I seen two men, but only two; and I asked Courtney if he had seen them, and he said he had.

Q. Some of the laboring men were there?

A. Some of the laboring men were there. Yes.

Q. And all the time you were around there gathering up your own machinery and looking after these other matters, you never saw any notices of any description stuck up in any part of the place.

A. No sir. I was down there ten minutes after Courtney stuck up his notices. But there were no notices on the wood or on the buildings.

Q. During the time you were there, did any of these men come to you and claim any of this machinery?

A. I was talking with King. And King told me he was going to go into town and get advice in the matter.

Q. Was there any other claim made at any time?

A. That is the only time I talked with anybody that seemed to have any authority. I was talking with the Jap, the cook—

UPON CROSS-EXAMINATION BY MR. CLEGG.

I think the wood was bought in for \$305., I wouldn't be right sure from memory, because I have no date with me now to show. I know the value of wood out there. Ringseth sold a lot of it for \$8.00 and some he sold for \$6.00 and some for \$5.00. It depends upon the character of the wood and how far they

have to haul it. I assisted in measuring the wood and was there when it was completed. My measurement, from memory, is between 72 and 75 cords, right to a cord I can't say. We had a hard time pulling it out of the mud, Smith and myself. We measured every stick of it that we knew. I know the machinery, exclusive of the boiler, was in pretty bad shape. I make a business of buying second hand machinery of that character and then fixing it up and selling it again. I admit our object is always to buy it as cheap as possible and to sell it at just as high a price as we can sell it, yes sir. Some of the wood was poor and water-soaked and I think if you get \$4.00 a cord for it you would be getting a good value. Some of it was not in the mud. The long wood will shrink forty percent because it was very small wood, and when you come to cut it up it would shrink. I think if they get \$4.00 a cord they will be getting a good price, or \$5.00. Good wood sells for \$6.00 and \$7.00 a cord, but this wood was a good deal of it brush.

S. B. WAITE, a witness for defendants, after being first duly sworn, testified in substance as follows, UPON DIRECT EXAMINATION BY MR. CLARK:

My name is S. B. Waite. I was a deputy marshal under Mr. H. K. Love in July 1912. I remember the two suits entitled J. E. Barrack vs. Russian Mining Company and C. E. Danforth and J. E. Barrack, assignee vs. Russian Mining Company. I made the sales under execution issued in said actions. I have examined a certified copy of the records of the Com-

missioner at Chatanika, marked Defendants' Exhibit A. I remember, to some extent, the circumstances of the sale of the personal property under that execution, and I made the return thereon. I cannot say that it is a correct copy of the writ shown in this instrument, unless I compared them. I remember, however, making the return to the office here in Fairbanks and mailing it to the Commissioner at Chatanika. I remember there were a number of bidders for the property, the wood wasn't closely piled—it is in the condition that wood is usually around a mining claim. I made no special effort to see if there were any notices, other than the attachment notices, posted upon the ground.

UPON CROSS EXAMINATION BY MR. CLEGG:

I was acting in the capacity of Deputy U. S. Marshal of H. K. Love, the defendant in this action, at the time I made said sale.

BAPTISTE SERAFINO, heretofore called for plaintiffs, was thereupon recalled to testify for defendants, and testified in substance as follows, UPON EXAMINATION BY MR. CLARK:

There were eleven partners in the Russian Mining Company, ten or eleven; I don't know their names. When I was there, there were about ten or eleven working altogether, some of them quit. There were four members remained there. I don't know that there were sixteen members. Neither Carl Post, Joe Jankowski nor Ivan Zalliper were members of the firm. Ivan Zalliper is known as

Baptiste. I don't know whether or not Ivan Zalliper was a member of the firm—there may have been a man there of that name, but I don't know. The names of the four partners who were there were Nick Chaloff, Walter Rosin, Lao—I don't know his other name, and Cosma. I don't know how many of those men that were working there were members of the Russian Mining Company. I would say that they were not. The list I had yesterday was the list of men that were working. None on the list were members of the firm—that is on the list given me on the 11th of June. The three that signed there were partners, but in the list of names there were no partners.

JOHN DURAND, a witness for defendants, being first duly sworn, testified in substance as follows
UPON DIRECT EXAMINATION BY MR. CLARK:

My name is John Durand. I am mining on the lower end of Dome Creek on the Chatanika Flats. I am acquainted with the ground the Russian Mining Company was working in 1912. I purchased from Mr. Barrack, after Marshal's sale, some of the property that was sold as the property of the Russian Mining Company. I was there at the time of the sale. I helped measure the wood on the ground. Some of it had been piled, but most of it was scattered all over the ground. It was in the water. The water was running right through it. After we got it piled up, we measured it. I do not remember exactly, but it was in the neighborhood of sixty cords, somewhere in that neighborhood, I cannot remember exactly. I

considered it very poor wood. I have been mining for a number of years and have been in the sawmill business. The wood, when I piled it and bought it, was in practically in the same condition that it was in in June 1912, except that we picked it up out of the water. I have bought considerable wood, considered that wood was a poor quality. I would consider the market value of the 16-ft wood at that time to be \$5. a cord and the market value of the 4-ft. wood between \$7. and \$8. I think I offered \$7.50 for it in the first place. I afterwards bought the wood. I am somewhat acquainted with the value of second hand machinery and have handled quite a lot of it. I examined the hoist used by the Russian Mining Company after the works had closed down. I used it for a while, that is, after I took possession. I just had the use of the hoist, I did not buy it. I got possession of it sometime in June, shortly after the marshal sold it. It was then in very poor condition. For my use I considered it was of no value. I didn't use it, I threw it out. I never used the bucket, it was a worn out bucket. I didn't use it at all. I got a bucket from Joe Ward, so I never gave the bucket any consideration whatever. The reason I didn't use the bucket was because I didn't think it fit for use. I saw the hoist several times when the Russian Mining Company was using it, saw it in operation. It was a poor running piece of machinery. I paid \$210 for the wood.

UPON CROSS EXAMINATION BY MR. CLEGG:

4-ft wood was worth between \$7.00 and \$8.00 per

cord—that particular wood. The 16-ft. wood, about \$5. per cord. The sixteen-ft wood was worth \$8.00 per cord I guess. I considered that it would be worth that to me at that time. There were in the neighborhood of 50 cords of 16-ft wood, or probably a few cords over. I made an effort to measure it. I did it by just going over the piles. It was scattered all over the ground. We kind of bunched it. After Mr. Barrack bought it, he told me to go ahead and have it piled, which I did. We had a man on pretty near two days, piled about sixty cords, just picked up out of the water what was laying in the water, and piled it on top of the wood that was out on dry ground. I don't remember exactly how much there was. I paid \$210. for it. I figured I was buying in the neighborhood of 60 cords, or a little over. I don't know exactly how many cords there was. We attempted at the time to make a careful estimate of it. Barrack was anxious to get rid of it and I was anxious to buy. That was what I paid him for the wood that was actually on the ground. I gave Mr. Barrack a check for it. I used Joe Ward's machinery. I didn't move my machinery up there.

DEFENDANTS REST.

Thereafter the case was duly argued by attorneys for plaintiffs and defendants, and during the course of the argument of attorney for plaintiffs, he waived all claim against any property described in the complaint, save and except 120 cords of wood; one dou-

ble cylinder hoist; one carrier; one bucket and one trolley cable. After the cause had been argued to the jury, the court thereupon instructed the jury as follows:

[Title of Court and Cause.]

Instructions.

GENTLEMEN OF THE JURY:

This is an action brought by Tom P. King and Baptiste Serafino, as trustees for certain creditors of the Russian Mining Company, a copartnership that has been doing business in this precinct, for the benefit of themselves, against R. M. Courtney and H. K. Love, to recover certain personal property which is described at length in the complaint, charging that it was taken from them by the defendants on or about the 11th day of June of last year, that the value of the property was seventeen hundred dollars, and also claiming damages for being deprived of the use of the property in the sum of three hundred dollars. They have also alleged that, prior to the commencement of the action, they made demand upon the defendants for the return and delivery of the possession of the property. The defendants have each answered, denying all of the material allegations of the complaint, and pleading special justification by reason of the fact that they claim to have taken possession of the property described in the complaint, or part of it, be reason of their official duties; that is, the defendant Courtney sets up that he was appointed a special officer to serve certain writ

of attachment issued by the commissioner's court at Chatanika, and the defendant Love sets up that, as United States marshal, he served and executed certain executions or writs for the sale of the personal property described, by virtue of these writs of execution issued in two separate actions by the commissioner's court at Chatanika. And the defendant Love further sets up that there was no instrument in writing conveying this property to plaintiffs, and that it is necessary that any trust agreement or conveyance of the property in trust for others should be expressed in writing, and also that the conveyance, under which the plaintiffs claim, was executed for the purpose of hindering, delaying or defrauding the creditors of the Russian Mining Company, and therefore is void. The affirmative allegations of the officers are met by the plaintiffs by general denial of each of them.

In this, as in all civil cases, it is incumbent upon the plaintiff to establish by a preponderance of evidence the truth of the allegations of their complaint, and, unless they do so, your verdict should be for the defendants. However, if you find that the allegations of the complaint are established by such preponderance, and you come to consider whether or not the affirmative matter of the reply are established, it is incumbent then, if the defendants set up such affirmative matter, that they establish same by a preponderance of evidence; and, unless you should find that such matters were so established, as to them you would find for the plaintiffs.

As you understand, the principal contention between the parties is whether or not there had been a valid conveyance, from the Russian Mining Company to these men claiming as trustees for the creditors of the Russian Mining Company, prior to the time that certain attachments were levied on the 11th day of June, 1912. That, really, is the gist of the cause to be decided by you.

You are instructed that while plaintiffs in their complaint originally claimed to be entitled to the immediate possession and to be the owners of all of the property enumerated in said complaint, they have through their attorney waived their claims on the trial to all thereof except one hundred and twenty cords of wood, one double cylinder hoist, one carrier, one bucket and one trolley cable, and therefore, in the event that you should find for the plaintiffs as to these specific items, or any part thereof, your verdict should not include any others; but you should under the evidence and the preponderance thereof, as I have heretofore instructed you, fix the total value of those items included in your verdict.

The court instructs you that the Russian Mining Company had a legal right to dispose of any of the property belonging to them on the 11th day of June, 1912 for the purpose of meeting any of their obligations then due, and they had a legal right to select one set of creditors in preference to others, if they so chose, even though they were not financially able to take care of all their creditors. The law provides a remedy for such creditors as are not taken

care of under these circumstances, and the remedy is not by subsequent attachment of the same property so disposed of.

The court instructs you that in levying a writ of attachment, the United States marshal, or any other authorized officer, acts at his peril, and when he seizes the personal property of one man wrongfully as the property of another, he is answerable to such man whose property is so wrongfully seized, in the same manner as any other individual not clothed with official authority who commits a like trespass.

You are instructed that if you find from a preponderance of the evidence in this case that the Russian Mining Company was the owner of any of the property now claimed by the plaintiffs on the morning of the 11th day of June, 1912, and that on said date and prior to the levy of any attachments by defendants or either of them, they had transferred or caused to be transferred their ownership therein to plaintiffs, and that the plaintiffs, prior to the levy of said attachments, actually took possession of said property and were in possession thereof at the time of the levy of said attachments, then you would be authorized to find for the plaintiffs as to all of said property so transferred to them and by them so taken into possession.

I instruct you that every conveyance or assignment in writing or otherwise of any interest in goods or merchandise of any character or description, made with intent to hinder, delay or defraud creditors or other persons of their lawful suits, damages, for-

feitures, debts, or demands, as against the persons so hindering, delaying or defrauding, are void.

You are instructed that all conveyances, transfers or assignments, whether verbal or written, or goods or chattels, made in trust for the person making the same, are void as against the creditors, existing or subsequent, of such person.

You are instructed that every sale or assignment of personal property, unless accompanied by the delivery and the actual and continued change of possession of the thing sold or assigned, shall be presumed, *prima facie*, to be a fraud against the creditors of the vendor or assignor or subsequent purchasers in good faith and for a valuable consideration during the time said property remains in the possession of said vendor or assignor.

You are instructed that, in contemplation of law, an attaching creditor is presumed to be a purchaser in good faith, and, if you find from the evidence in this case that the Russian Mining Company owned certain machinery described in plaintiffs' complaint, and gave to C. H. Ward a bill of sale thereof, and if you also find that the Russian Mining Company still retained possession of said personal property, and that the possession thereof was not given to and retained by said Ward, then said bill of sale was, as far as the creditors of said Russian Mining Company are concerned, null and void, so, long as the possession was retained by the Russian Mining Company; and if you find that the bill of sale that was introduced in evidence was given to Ward as se-

curity for his debt, and not as an absolute conveyance, then Ward could not assign to the plaintiffs in this action any greater interest in this property than he had himself.

And, if you find from the evidence that Ward assigned to the plaintiff in this case all his interest in the property covered by the bill of sale, then, unless the plaintiffs had taken physical possession of said property before the attachment was levied by the United States marshal, in the case of J. E. Barrack, assignee, against the Russian Mining Company, such attachment would take precedence over said transfer.

You are instructed that after said attachment had been levied on the personal property described in said bill of sale—if you find such attachment was levied—said property was thereafter in the custody of the United States marshal, and it is admitted by the pleadings, and you are so instructed, that said property was in his custody until the time the same was sold at marshal's sale.

You are instructed that there cannot be two possessions of the same personal property at the same time, and, unless you find that the property described in the complaint was in the actual possession of the plaintiffs in this action when said attachments were levied—if you find the same were levied—then your verdict must be for the defendants in this action.

You are further instructed that it is incumbent upon the plaintiffs to show by a preponderance of evidence that they hold the property claimed in their complaint as trustees for a person or a class of per-

sons that can be designated with reasonable certainty, and the amount of whose claims can be ascertained by you with reasonable certainty; and that if you find that any property was held in trust by the plaintiffs for the benefit of certain creditors of the Russian Mining Company, that said property was of greater value than the amount of the claims held by the plaintiffs as trustees, and that as trustees they had secured title to said property in manner prescribed by law, then you could not bring in a verdict for the plaintiffs in any greater amount than the total amount of the claims so held by them.

In arriving at the value of the personal property described in plaintiffs' complaint, you must determine what the reasonable market value of the same was at the time and place mentioned, that is to say, the value for which it could be sold in the open market at that time and place, provided you find that there was a general market value for such property; otherwise, it would be the reasonable value to the plaintiffs at that time and place.

You are instructed that, at any time within four months after the levy of the attachments under which this property was seized and sold, the plaintiffs and persons represented by them could have had said attachment lien set aside by proceedings in bankruptcy to have said Russian Mining Company adjudged bankrupt, and said laborers who had performed labor within three months prior to such adjudication, would have had a preference in a sum not exceeding three hundred dollars; and, if there

had been sufficient property of said bankrupt to pay the same, said laborers would have received the preference to the extent of the moneys earned within three months prior to said adjudication, in a sum not exceeding three hundred dollars.

You are instructed that the judgments rendered in the commissioner's court at Chatanika under which the property was sold by the United States marshal, so far as plaintiffs are concerned, were at all times valid judgments, and the proceedings thereunder are to be considered regular until set aside by an order of the court in a direct proceeding instituted for that purpose, and that the validity of said judgments cannot be inquired into in a proceedings of this kind; that is, that said judgments, and the proceedings thereunder, are valid for the purposes of this action for transferring all the right, title and interest of the Russian Mining Company in the property under the instructions I have given you heretofore.

You are instructed that this is an action in the nature of an action in replevin, and if you find from a preponderance of evidence that the plaintiffs are entitled to the property described in the complaint, or any part thereof, your judgment should be for the return of the property, or for the payment by the defendants of the value thereof in a sum not greater than the amount of the claims, as shown by the plaintiffs' testimony, of the laborers and other creditors for whom the plaintiffs were trustees.

You, gentlemen, are the sole judges of all questions of fact, and of the credibility of the witnesses,

and the weight to be given to their testimony. Your power of judging that is not arbitrary, but should be exercised in accordance with the instructions given you by the court.

It is your duty to take into consideration all the evidence given in the case, and the testimony of each and every witness, and give to every part of the testimony such weight as in your opinion it is entitled to.

Forms of verdict have been prepared which will be handed to you. If you find for the plaintiffs, you will find the property which should be returned to them, or, if return thereof cannot be had, then find the value of the property. In any event, if you find for the plaintiff, you should find the articles to be returned, and the value of such articles, as well as the total value. If you find for the defendant, you will return a verdict finding for the defendant, without assessing value.

MR. CLARK: There was a matter that I intended to ask the court to strike out, but I will ask the court to instruct upon. There was a list presented that the men signed up for the amount of their claims. We ask the court to instruct the jury as to what weight is to be given to their claims, or what the jury should consider as evidence as to the amount the men wrote as to their claims.

MR. CLEGG: We object to that.

THE COURT: The motion to strike out would be denied.

MR. CLARK: I wasn't moving to strike. I want

the court to instruct on that point.

THE COURT: The court will instruct you that such list was introduced as evidence of the parties intended to be named as beneficiaries of the trust,—as the names of the parties for whom the plaintiffs were acting as trustees; and that the amounts stated on that list is not competent evidence that such amounts were due the plaintiffs except insofar as there has been other testimony given upon the trial in corroboration of the amounts. The mere fact that those amounts appear upon that list is not sufficient evidence that such sums were due them from the Russian Mining Company.

Instructions given to the jury at Fairbanks, Alaska Nov 14, 1913.

DISTRICT JUDGE.

The cause was then submitted to said jury, and thereafter they returned into court and rendered their verdict, which is as follows: (Omitting the name of court and title of said cause)

“We the jury duly empanelled and sworn to hear, try and determine the issues in the above entitled action do hereby find and return a verdict in favor of plaintiffs and against defendants and that plaintiffs are the owners and entitled to the immediate possession of the following described personal property, being a portion of the property described in the complaint herein namely:—

75 cords of wood at \$5.00, \$375.00; one double cylinder hoist \$100; one carrier \$50.00; one bucket

\$25.00; one trolley cable \$25.00, all situate on placer claim Number One below on Chatanika Flats, Fairbanks Recording District, Alaska, at the time of the commencement of this action, or in case delivery thereof cannot be had to plaintiffs, then we find that plaintiffs are entitled to recover the value thereof namely Five hundred and seventy five dollars (\$575.00) from defendants.

Dated at Fairbanks, Alaska this 14th day of November 1913.

GEO. W. PENNINGTON, Foreman."

Thereafter, and within the time prescribed by law, the defendants filed a motion for new trial, which is as follows:

[Title of Court and Cause.]

Motion for New Trial.

To the Plaintiff above named and to Mr Cecil H. Clegg, his Attorney:

Now come the defendants above named and respectfully move the above entitled court to set aside the verdict rendered by the Jury duly impaneled and sworn to try the issues in the above entitled cause, which said verdict was rendered on the thirteenth day of November, A. D. one thousand nine hundred thirteen, and to grant defendants a new trial on the grounds following, to-wit:

(1) That excessive damages were allowed to plaintiffs, and that said damages were apparently given under the influence of passion or prejudice;

(2) Insufficient evidence to justify the verdict.

rendered in said cause;

(3) Errors in law occurring at the trial and excepted to by defendants;

(4) That there is no warrant in law for the rendition of a verdict of the character of the verdict rendered by said Jury;

(5) That the evidence conclusively shows that the plaintiff is not entitled to a judgment in the amount for which said Jury rendered its verdict, or in any sum whatsoever;

(6) That the Jury, in rendering the verdict rendered in said cause, were not justified in rendering the same by any evidence introduced in said cause;

(7) That, from the evidence adduced at the trial of said action, it conclusively appears that the instrument, claimed by plaintiffs to be a bill of sale from the Russian Mining Company to C. H. Ward, was in reality a chattel mortgage, and that said chattel mortgage was void and did not transfer the title of the property described therein to said C. H. Ward, and that said C. H. Ward could not have transferred the title to said property to the plaintiffs in this action;

(8) That the plaintiffs did not prove that they were trustees for the claimants whose claims aggregated a greater sum than the sum of four hundred seventy two dollars;

(9) That the verdict of said Jury is further erroneous in this that, if plaintiffs were entitled to the possession of any property, they would be entitled to the possession of all the property set forth in

the alleged bill of sale given by the Russian Mining Company to C. H. Ward;

(10) That said verdict was apparently rendered under the influence of prejudice, and is indefensible from the standpoint of the evidence adduced or the law applicable thereto.

This motion will be made on all the papers, records, and files in the above entitled cause and on the testimony adduced in said cause.

WHEREFORE: Defendants pray that said verdict be set aside and that defendants herein be given and granted a new trial in said cause.

Fairbanks, Alaska, 17 November, 1913.

McGOWAN & CLARK,

Attorneys for Defendants."

Thereafter said motion for new trial was duly argued and submitted to the court for decision, and overruled, to which the defendants then and there excepted, and their exception was allowed.

Thereafter and in pursuance of said verdict so rendered, and on the 9th day of December, 1913, a judgment was duly and regularly made, given and entered in the above entitled action, to the entry of which the defendants then and there excepted, and their exception was allowed.

AND NOW, in furtherance of justice and that right may be done to the petitioners, the defendants in the above entitled action present the foregoing bill of exceptions in this cause, and pray that the same may be examined and allowed and signed.

and certified by the judge of this court, in the manner prescribed by law.

McGOWAN & CLARK,

Attorneys for Defendants.

Due service of the within bill of exceptions and receipt of a copy thereof are hereby acknowledged this 11th day of February, 1914.

CECIL H. CLEGG,

Attorney for Plaintiffs.

(Indorsed): Filed in the District Court, Territory of Alaska, 4th Div., Feb. 11, 1914. Angus McBride, Clerk.

[Title of Court and Cause.]

Order Allowing Bill of Exceptions.

Now on this 24th day of February, 1914, the above named defendants, by their attorneys, duly presented the foregoing bill of exceptions in the above entitled cause, for settlement and allowance, in the manner prescribed by law and the practice of this court; and it appearing to the court that said bill of exceptions was duly served and filed within the time allowed by law, and that the plaintiffs in said action did not file any proposed amendments thereto and have filed no objections to the settling thereof, and that the same is true and correct in all respects and contains all the material testimony, evidence and exhibits, or other proof whatsoever introduced by either party upon the trial of the above entitled action, and proceedings subsequent thereto, now, therefore,

IT IS ORDERED AND ADJUDGED that said bill

of exceptions be, and the same is hereby, allowed and signed as the bill of exceptions in the above entitled cause and is ordered made a part of the records in said cause.

Dated March 11, 1914.

F. E. FULLER,

District Judge.

Due service hereof admitted this March 11, 1914.

CECIL H. CLEGG,

Attorney for Plaintiff.

Entered in Court Journal No. 12, page 875.

(Indorsed): Filed in the District Court, Territory of Alaska, 4th Div., Mar. 11, 1914. Angus McBride, Clerk. By P. R. Wagner, Deputy.

[Title of Court and Cause.]

Judgment.

This cause coming on to be heard on the 13th day of November 1913, the same being one of the regular court days of the Special November 1913 term of court, for the trial thereof, the date thereof having been theretofore fixed, the plaintiffs herein being represented by Cecil H. Clegg, as attorney, and the defendants being represented by Messrs. McGowan and Clark, attorneys, and both sides having announced their readiness for trial, the same was thereupon duly proceeded with, plaintiffs introducing oral and documentary testimony before the court and a jury duly and regularly empanelled for that purpose, and thereupon said plaintiffs rested; and said defendants thereupon introduced oral and docu-

mentary evidence in their behalf and rested, and the said cause was thereafter on the 14th day of November 1913 argued to the jury by the attorneys for the respective parties thereto, and said jury thereafter, upon receiving instructions of the court, retired to consider of their verdict and on said day returned into court and announced that they had agreed upon a verdict, which said verdict was in the words and figures following to-wit, (omitting the name of court and title of said cause)

"We the jury duly empanelled and sworn to hear try and determine the issues in the above entitled action do hereby find and return a verdict in favor of plaintiffs and against defendants and that plaintiffs are the owners and entitled to the immediate possession of the following described personal property, being a portion of the property described in the complaint herein namely:—

"75 cord cords of wood at \$5.00, \$375.00; one double cylinder hoist \$100; one carrier \$50.00; one bucket \$25.00; one trolley cable \$25.00, all situate on placer claim Number One below on Chatanika Flats, Fairbanks Recording District, Alaska, at the time of the commencement of this action, or in case delivery thereof cannot be had to plaintiffs, then we find that plaintiffs are entitled to recover the value thereof namely Five hundred and seventy five dollars (\$575.00) from defendants.

Dated at Fairbanks, Alaska this 14th day of November 1913. GEO. W. PENNINGTON,

Foreman."

and thereafter said defendants having filed and presented and argued to the court a motion for a new trial, which was thereafter duly considered by said court and denied on the 8th day of December 1913;

NOW THEREFORE by virtue of the law and the premises and the verdict of said jury it is now and hereby ordered and adjudged that plaintiffs herein are the owners and entitled to the immediate possession of the following described personal property, being a portion of the property described in the complaint herein, namely:— 75 cords of wood of the value of Three hundred and seventy five dollars, one double cylinder hoist of the value of One hundred dollars; one carrier of the value of Fifty dollars; one bucket of the value of twenty five dollars; one trolley cable of the value of twenty five dollars, all situate on placer claim Number One below discovery on Chatanika Flats, Fairbanks Recording District, Alaska, at the time of the commencement of this action; and it is further ordered and adjudged by the court that in case redelivery thereof cannot be had and made to plaintiffs, that said plaintiffs are entitled to and do have and recover of and from the defendants herein the value thereof towit, the sum of FIVE HUNDRED AND SEVENTY FIVE DOLLARS, lawful money of the United States, and their costs and disbursements herein taxed at the sum of \$.....

Done in open court this 9th day of December 1913.

F. E. FULLER,

District Judge.

Entered in Court Journal No. 12 page 791.

(Indorsed): Filed in the District Court, Territory of Alaska, 4th Div., Dec. 9, 1913. Angus McBride, Clerk. By P. R. Wagner, Deputy.

[Title of Court and Cause.]

Petition for Writ of Error.

R. M. Courtney and H. K. Love, defendants in the above entitled action, feeling themselves aggrieved by the verdict of a jury, rendered herein on November 13, 1913, and the judgment of the court made and entered herein, in pursuance thereof, on December 9, 1913, against the defendants herein for the sum of five hundred and seventy-five dollars (\$575.00) and costs of suit,

Now come Messrs. McGowan & Clark, their attorneys, and petition this Honorable Court for an order allowing these defendants to prosecute a writ of error to the Honorable Circuit Court of Appeals for the Ninth Circuit, at San Francisco, State of California, according to the laws in that behalf made and provided; and

WHEREAS said defendants desire a stay of execution, pending the hearing of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit,

NOW, THEREFORE, said defendants petition that an order be made fixing the amount of security which they shall give and furnish on said writ of error, and that on the giving of such security all further proceedings in this court may be suspended and stayed until the determination of said writ of

error by said Circuit Court of Appeals for the Ninth Circuit.

And your petitioners will ever pray.

Dated January 26, 1914.

McGOWAN & CLARK,

Attorneys for Defendants.

Due service admitted Jan. 26th, 1914.

CECIL H. CLEGG Attorney for Plaintiffs.

(Indorsed): Filed in the District Court, Territory of Alaska, 4th Div., Jan. 26, 1914. Angus McBride, Clerk. By P. R. Wagner, Deputy.

[Title of Court and Cause.]

Assignment of Error.

Come now the defendants in the above entitled cause, being the plaintiffs in error, and assign the following error as having been committed by the above named court on the trial of the above entitled action, which error the said defendants intend to and do rely upon on their writ of error to be prosecuted to the United States Circuit Court of Appeals for the Ninth Circuit:

1. The Court erred in entering the judgment of date December 9, 1913, in the above entitled action;
2. The Court erred in overruling defendants' motion for new trial;
3. The Court erred in receiving and accepting the verdict of the jury, given, made and entered in the above entitled cause on November 14, 1913;
4. The Court erred in overruling defendants' request, at the conclusion of the plaintiffs' case, for non-suit and to dismiss said action;
5. The Court erred in refusing, at the conclusion

of plaintiffs' case, upon the motion of the defendants, to direct the jury to bring in a verdict in favor of defendants;

6. The Court erred in entering any judgment against the defendant, R. M. Courtney;

7. The Court erred in refusing defendants' motion to strike out certain evidence given by Baptiste Serafino, one of the plaintiffs, said testimony being as follows:

Q. "Now state what you did under those instructions as Trustees that same day.

A. Well, we went down on the claim and took possession of it.

MR. CLARK: We object to that as calling for a conclusion and ask that it be stricken.

THE COURT: The answer may stand.

MR. CLARK: We save an objection."

8. The Court erred in permitting the introduction of plaintiffs' Exhibit No. 3, over defendants' objection, said exception and exhibit being as follows:

"MR. CLARK: We object, as we contend that there are names on there that do not belong there.

THE COURT: The paper may be admitted for the purpose stated.

(Marked Plaintiffs' Exhibit 3)

(Plaintiffs' Exhibit 3 is a list of names as follows:)

'Bozs Wucettih.

Nick Cvietovich

Mike Zizich

Enan Honlob

Alexandr Honob

Gob Ston

Alick ——

Tom King

Sam Falar

Nick Aldatoff

Shorn

Gob Jankuwzki

Call Post

Baptiste Serafino

Juan Mien Seki.'

MR. CLARK: We not an exception. (Exception allowed).

WHEREFORE the defendants pray that the judgment in the above entitled action may be reversed and that they may be allowed all things that they have lost thereby.

Dated at Fairbanks, Alaska, this 26th day of January, A. D. 1914.

McGOWAN & CLARK,

Attorneys for Defendants.

Due service of the foregoing assignment of error is hereby admitted this 26th day of January, A. D. 1914.

CECIL H. CLEGG,

Attorney for Plaintiffs.

(Indorsed): Filed in the District Court, Territory of Alaska, 4th Div., Jan. 26, 1914. Angus McBride, Clerk. By P. R. Wagner, Deputy.

[Title of Court and Cause.]

Order Allowing Writ of Error and Fixing Bond.

On motion of Messrs. McGowan & Clark, attor-

neys for defendants, and the filing of a petition for a writ of error, and assignment of error,

IT IS ORDERED that a writ of error be, and same is hereby, allowed, to have reviewed by the Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, State of California, the judgment heretofore made and entered herein on December 9, 1913, and that the amount of the bond on said writ of error be, and the same is hereby, fixed at the sum of One Thousand Dollars, to cover supersedeas, and costs to defendants in error.

Dated at Fairbanks, Alaska, this January 26th,
A. D., 1914.

F. E. FULLER,

District Judge.

Due service hereof admitted this January 26th,
A. D. 1914.

CECIL H. CLEGG,

Attorney for Plaintiffs.

Entered in Court Journal No. 12, page 846.

(Indorsed): Filed in the District Court, Territory of Alaska, 4th Div., Jan. 26, 1914. Angus McBride, Clerk.

[Title of Court and Cause.]

Writ of Error.

United States of America,
Territory of Alaska.—ss.

The President of the United States of America, to the Hon. Frederic E. Fuller, Judge of the District Court, Territory of Alaska, Fourth Division, Greeting:

Because, in the records and proceedings, as also in the rendition of a judgment dated December 9, 1913, of a plea which is in the said District Court of the Territory of Alaska, Fourth Division, before you, between Tom P. King and Baptiste Serafino, as plaintiffs, and R. M. Courtney and H. K. Love, as defendants, manifest error hath happened, to the great prejudice and damage of the said R. M. Courtney and H. K. Love, as is said and appears by the petition herein,

We, being willing that error, if any hath been, shall be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you that if said judgment be therein given, then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justices of the United States Circuit Court of Appeals, for the Ninth Circuit, in the City of San Francisco, State of California, together with this writ, so as to have same at said place, in said circuit, on the 25th day of February, A. D. 1914, that the records and proceedings aforesaid, being inspected, the said Circuit Court of Appeals for the Ninth Circuit may cause further to be done therein to correct such error, what of right and according to the laws and customs of the United States should be done.

WITNESS the Hon. EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 26th day of January, A. D. 1914.

Attest my hand and the seal of the District Court

for the Territory of Alaska, Fourth Division, at the clerk's office in Fairbanks, Alaska, on this 26th day of January, A. D. 1914.

SEAL)

ANGUS M'BRIDE,

Clerk of the District Court for the Territory of
Alaska, Fourth Division.

Allowed this 26th day of January, A. D. 1914.

F. E. FULLER,

Judge of the District Court for the Territory of
Alaska, Fourth Division.

Due service hereof admitted this January 26th,
A. D. 1914.

CECIL H. CLEGG,

Attorney for Plaintiffs.

(Indorsed): Filed in the District Court, Territory
of Alaska, 4th Div., Jan. 26, 1914. Angus McBride,
Clerk.

[Title of Court and Cause.]

Citation on Writ of Error.

United States of America,
Territory of Alaska.—ss.

The President of the United States of America to
Tom P. King and Baptiste Serafino, Trustees, and to
Cecil H. Clegg, their Attorney, Greeting:

You are hereby cited and admonished to be and ap-
pear at the United States Circuit Court of Appeals
for the Ninth Circuit, to be holden in the City and
County of San Francisco, State of California, within
thirty days from the date of this citation, pursuant
to the writ of error filed in the office of the clerk of

the District Court for the Territory of Alaska, Fourth Judicial Division, wherein R. M. Courtney and H. K. Love are plaintiffs in error, to show cause, if any there be, why the judgment in the said writ of error mentioned, should not be corrected and speedy justice should not be done to the parties in error in that behalf.

WITNESS the HON. EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States of America, on this 26th day of January, A. D. 1914, and in the year of our Independence the one hundred and thirty-eighth.

Attest my hand and the seal of the above named District Court, at Fairbanks, Alaska, on this 26th day of January, A. D. 1914.

F. E. FULLER,

District Judge.

Due service hereof admitted this Jan. 26th, 1914.

CECIL H. CLEGG,

Attorney for Plaintiffs.

(Indorsed): Filed in the District Court, Territory of Alaska, 4th Div., Jan. 26, 1914. Angus McBride, Clerk.

[Title of Court and Cause.]

Order Relative to Supersedeas Bond on Writ of Error.

The defendants having on this day filed their petition for writ of error from the verdict and judgment thereon, made and entered herein, to the United States Circuit Court of Appeals for the Ninth Cir-

cuit at the City of San Francisco, State of California, together with an assignment of error within due time, and also praying that an order be made, fixing the amount of security which defendants shall give and furnish on said writ of error, and that on the giving of said security all further proceedings in this court be suspended and stayed until the determination of said writ of error by said Circuit Court of Appeals for the Ninth Circuit; and said petition having been this day duly allowed and supersedeas and cost bond fixed, now, therefore,

IT IS ORDERED that upon the defendants filing with the Clerk of this court a good and sufficient bond in the sum of One Thousand Dollars, conditioned as a cost and supersedeas bond, all as provided by law, which said bond shall be approved by this court, then and thereafter all proceedings in this court shall be, and they are hereby, suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, State of California.

Dated at Fairbanks, Alaska, this January 26th, A. D. 1914.

F. E. FULLER,

District Judge.

Due service hereof admitted this January 26th, 1914.

CECIL H. CLEGG,

Attorney for Plaintiffs.

Entered in Court Journal No. 12, page 846.

(Indorsed): Filed in the District Court, Territory of Alaska, 4th Div., Jan. 26, 1914. Angus McBride, Clerk.

[Title of Court and Cause.]

Supersedeas Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS that we, R. M. Courtney and H. K. Love, as principals, and John Barrack and J. E. Barrack, as sureties, are held and firmly bound unto the defendants in error, Tom P. King and Baptiste Serafino, Trustees, in the just and full' sum of one thousand dollars (\$1,000.00), to be paid to said defendants in error, their executors, administrators or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally, by these presents.

Sealed with our hands and dated this 26th day of January, A. D. 1914.

WHEREAS on the 9th day of December, A. D. 1913, in the District Court in and for the Fourth Judicial Division, Territory of Alaska, in a suit pending in said court between Tom P. King and Baptiste Serafino, as Trustees, plaintiffs, and R. M. Courtney and H. K. Love, defendants, a judgment was rendered against said R. M. Courtney and H. K. Love, defendants; and the said defendants having obtained a writ of error and filed a copy thereof in the office of the Clerk of said court, to reverse the judgment aforesaid, and a citation directed in the said action to Tom P. King and Baptiste Serafino, Trustees,

citing and admonishing them to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, State of California, on the 25 day of February, 1914; and

WHEREAS plaintiffs in error desire a stay of execution in the above-entitled action pending the above appeal;

Now, the condition of the above obligation is such that if the said R. M. Courtney and H. K. Love shall prosecute said Writ of Error to effect and answer and pay all judgments, damages and costs if they fail to make the said plea good, then the above obligation is to be void; otherwise to remain in full force, effect and virtue.

R. M. COURTNEY,
H. K. LOVE,
By JOHN A. CLARK,
One of their Attorneys.
Principals.

J. E. BARRACK,
JOHN BARRACK,
Sureties.

In the presence of JOHN A. CLARK.

O. K. as to sureties.

CECIL H. CLEGG,

Atty. for Plfs.

United States of America,

Territory of Alaska.—ss.

John Barrack and J. E. Barrack, being first duly

sworn, each for himself and not one for the other, deposes and says:

I am a resident of Fairbanks Precinct, Territory of Alaska, and am not an attorney or counselor at law, marshal or deputy marshal or clerk of the Court or officer of any court in the Territory of Alaska; I am worth the amount named in the foregoing bond, in property not exempt from execution, situate in the Territory of Alaska, over and above all my just debts and liabilities.

J. E. BARRACK.

JOHN BARRACK,

Subscribed and sworn to before me this January 26, 1914.

(SEAL)

JOHN A. CLARK,

Notary Public for Alaska. My Commission expires Apr. 24, 1914.

Approved Jan. 26, 1914.

F. E. FULLER,

District Judge.

(Indorsed): Filed in the District Court, Territory of Alaska, 4th Div., Jan. 26, 1914. Angus McBride, Clerk. By P. R. Wagner, Deputy.

[Title of Court and Cause.]

Designation of Place for Hearing of Writ of Error.

To the Hon. Frederic E. Fuller, Judge of the above named Court, to the Plaintiffs and their Attorney:

Now come the defendants, plaintiffs in error, in the

above entitled action, and pursuant to the provisions of the Act of Congress giving the designation of the place of hearing on writs of error to the plaintiffs in error, do hereby designate the City and County of San Francisco, State of California, as the place for the hearing on the writ of error in the above entitled action.

Dated at Fairbanks, Alaska, January 26th, A. D. 1914.

McGOWAN & CLARK,

Attorneys for Defendants.

Due service hereof admitted this January 26th, A. D. 1914.

CECIL H. CLEGG,

Attorney for Plaintiffs.

(Indorsed): Filed in the District Court, Territory of Alaska, 4th Div., Jan. 26, 1914. Angus McBride, Clerk. By P. R. Wagner, Deputy.

[Title of Court and Cause.]

**Nunc Protunc Order Extending Time Within Which
to File and Docket Cause on Writ of Error.**

The above matter coming on for hearing upon motion of the defendants above named, the plaintiffs in error, for an order extending the time within which to file and docket the record herein on writ of error, with the Clerk of the Circuit Court of Appeals at San Francisco; and it appearing to the satisfaction of the court that on January 26 1914 an order was made extending said time to April 1, 1914, and

that thereafter and on or about March 16, 1914, an order was made by this court extending said time until May 1, 1914, and that through excusable error or oversight, said order was not entered at said time and has not since been entered of record; and it further appearing to the satisfaction of this court that it has been impossible to have said record printed in time to have same filed with the Clerk of the Circuit Court of Appeals for the Ninth Circuit, at San Francisco, on or before May 1, 1914, owing to the inability of the printers to prepare said record in said time, and that the extension requested until June 1, 1914, is not unreasonable, now, therefore,

IT IS ORDERED that the time within which the defendants above named, the plaintiffs in error, shall file and docket their record on writ of error, with the Clerk of the Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, be, and same is hereby extended until June 1, 1914, and that this order be entered **nunc protunc** as of March 31, 1914, to which order plaintiffs except and this exception is allowed.

Done in open court this 15th day of April, 1914.

F. E. FULLER,

District Judge.

Entered in Court Journal No. 12, page 904.

(Indorsed): Filed in the District Court, Territory of Alaska, 4th Div., Apr. 15, 1914. Angus McBride, Clerk. By P. R. Wagner, Deputy.

[Title of Court and Cause.]

Praecipe for Transcript.

TO THE CLERK OF THE ABOVE ENTITLED COURT:

You will please prepare a transcript of the record in the above entitled cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, situate at San Francisco, California, under writ of error heretofore perfected to said Court, and include in said transcript the following papers, to-wit:

1. Complaint.
2. Separate Answer of R. M. Courtney.
3. Separate Answer of H. K. Love.
4. Reply to Answer of R. M. Courtney.
5. Reply to Answer of H. K. Love.
6. Bill of Exceptions.
7. Judgment.
8. Petition for Writ of Error.
9. Assignment of Error.
10. Order Allowing Writ of Error and Fixing Bond.
- 11 Writ of Error.
12. Citation on Writ of Error.
13. Order Relative to Supersedeas Bond on Writ of Error.
14. Supersedeas Bond on Writ of Error.
15. Designation of Place for Hearing on Writ of Error.
16. Nunc Protunc Order Extending Time Within Which to File and Docket Cause on Writ of Error.

17. Stipulation Relative to Printing Record.

18. Praeipie for Transcript.

This transcript to be prepared as required by law and the orders and rules of this Court and the United States Circuit Court of Appeals for the Ninth Circuit, and is to be printed and certified to by you under and by virtue of the rule of this Court for printing of records on appeal or writ of error, made March 21, 1914, and when so printed and certified is to be filed in the office of the Clerk of said United States Circuit Court of Appeals in San Francisco, California, on or before the first day of June, 1914, pursuant to order of this Court extending the time to file said record. **McGOWAN & CLARK,**

Attorneys for Defendants.

Due service of the within Praeipie and receipt of a copy thereof are hereby acknowledged this 21st day of April, 1914, and consented that said papers shall constitute the record on writ of error herein.

CECIL H. CLEGG,

Attorney for Plaintiffs, the Defendants in Error.

(Indorsed): Filed in the District Court, Territory of Alaska, 4th Div., Apr. 22, 1914. Angus McBride, Clerk.

Clerk's Certificate to Record.

United States of America,
Territory of Alaska,
Fourth Division.—ss.

I, **ANGUS McBRIDE**, Clerk of the District Court, Territory of Alaska, Fourth Division, do hereby cer-

tify that the foregoing, consisting of 161 pages, numbered from 1 to 161, inclusive, constitutes a full, true and correct transcript of the record on writ of error in Cause No. 1799, entitled Tom P. King and Baptiste Serafino, Trustees, Plaintiffs, vs. R. M. Courtney and H. K. Love, Defendants, wherein R. M. Courtney and H. K. Love are Plaintiffs in Error and Tom P. King and Baptiste Serafino, Trustees, are Defendants in Error, and was made pursuant to and in accordance with the praecipe of the Plaintiffs in Error, filed in this action and made a part of this transcript, and by virtue of the citation issued in said cause, and is the return thereof in accordance therewith; and I further certify that this transcript of record was printed under and by virtue of and in compliance with a "Rule for Printing Records on Appeal or Writ of Error", made by this Court on the 21st day of March, 1914, and that said transcript of record was indexed by me pursuant to said rule, and that the index thereof, consisting of pages i to iii, is a correct index of said transcript of record; also that the costs of preparing said transcript and this certificate, amounting to sixty and 50-100 dollars (\$60.50), have been paid to me by counsel for Plaintiffs in Error in said action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court, this second day of May, 1914.

(SEAL)

ANGUS M'BRIDE,
Clerk District Court, Territory
of Alaska, 4th Division.

6

No. 2427

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

R. M. COURTNEY and H. K. LOVE,

Plaintiffs in Error,

VS.

TOM P. KING and BAPTISTE SERAFINO,

Defendants in Error.

BRIEF OF PLAINTIFF IN ERROR.

McGOWAN & CLARK,
Fairbanks, Alaska,
Attorneys for Plaintiffs in Error.

Filed this.....day of October, 1914.

Filed....., Clerk.

By NOV 4 - 1914 Deputy Clerk.

F. D. Monckton,
Clerk.

No. 2427

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

R. M. COURTNAY and H. K. LOVE,

Plaintiffs in Error,

VS.

TOM P. KING and BAPTISTE SERAFINO,

Defendants in Error.

BRIEF OF PLAINTIFF IN ERROR.

The Case.

This is an action in replevin instituted on July 15, 1912, by Tom P. King and Baptiste Serafino, plaintiffs, as trustees for themselves and other unnamed, against H. K. Love, as United States Marshal for the Fourth Division, Territory of Alaska, and R. M. Courtney, to recover the possession of certain personal property, described in plaintiffs' complaint, of the alleged value of \$1,700.00, seized on attachment on June 11, 1912, together with damages in the sum of \$300.00, and in the event the return of said property could not be had, for the value thereof (Tr. pp. 2-5). On April 18, 1913,

R. M. Courtney filed a separate answer, denying in explicit terms, or on information and belief, all the allegations of plaintiffs' complaint, except that he admitted that plaintiffs had demanded of him that he return and redeliver possession of said property to them, and that he had refused so to do. As a separate affirmative defense, he alleges that on the day the property was alleged to have been seized, an action was instituted in the office of the Commissioner and ex-officio Justice of the Peace of Fairbanks Precinct, at Chatanika, entitled J. E. Barrack v. Russian Mining Company, wherein judgment was prayed for \$570.20, together with costs of suit, and there being no Marshal or Deputy Marshal at the place where Court was held, that the Commissioner and ex-officio Justice of the Peace, in pursuance of the provisions of the laws of the Territory of Alaska, appointed him as a special officer for the purpose of serving a writ of attachment in said cause, and that he, on said 11th day of June, 1912, received writ of attachment from said Commissioner, and in pursuance of the provisions thereof, levied on all the Russian Mining Company's interests in a lot of wood, a boiler house, machinery contained therein, the machinery in the mine or on the surface of the mine being operated by it, and upon the messhouse, all provisions, ranges, cooking utensils, etc., situate on Discovery Claim, Chatanika River, Fairbanks Precinct, Territory of Alaska, and that the property so attached was embraced in the list claimed by the plaintiffs in this action; that he placed a keeper in charge of the property and sold, as perishable

property, 145 lbs. of beef, and afterwards paid in to the United States Marshal the money received therefor (Tr. pp. 6-8).

As a second affirmative defense, he alleges that on June 11, 1912, another action was instituted in the same Court by C. E. Danforth against Russian Mining Company, praying judgment for the sum of \$437.50, and that in said cause he was appointed a special officer and levied a second attachment on the same property, placed a keeper in charge, and that thereafter his authority ceased by virtue of the terms of his appointment, and he had nothing further to do with said property (Tr. pp. 9-10).

On April 18, 1913, H. K. Love, as United States Marshal, filed a separate answer in said cause, denying expressly or upon information and belief all matters contained in said complaint, with the exception that he admitted that demand had been made upon him by the plaintiffs for the return of the property (Tr. pp 11-12). For a separate affirmative answer and defense, he alleged that he was the duly appointed, qualified and acting United States Marshal for the Fourth Judicial Division, Territory of Alaska, and that on June 11, 1912, J. E. Barrack instituted an action in the Commissioner's Court for Fairbanks Precinct, at Chatanika, against the Russian Mining Company, seeking to recover \$570.22, with costs, alleging the issuance of a writ of attachment in said cause, directed to said United States Marshal, the appointment of R. M. Courtnay as a special officer to serve the writ, the service of the writ and attachment

of personal property alleged to belong to the Russian Mining Company, particularly describing the property attached, the list of which contains a portion of the property claimed by the plaintiffs, alleging the appointment of a keeper to take charge thereof, and that thereafter judgment was rendered in said cause in favor of Barrack and against the Russian Mining Company for \$570.22, with interest, and \$22.70 costs; that after the attachment was levied, the special officer had caused an inventory of the property attached to be made, and had sold a portion of the perishable property, to-wit: 145 lbs. of beef, for \$40.00, and after deducting fees for services rendered, had delivered \$34.34 to the defendant United States Marshal to hold, subject to the final determination of the cause; that on June 21, 1912, an execution was issued out of said Commissioner's Court in said cause, and on June 24, 1912, it was placed in the hands of the defendant United States Marshal for service, with instructions to levy upon and sell sufficient property of the Russian Mining Company to satisfy the judgment; and that under the terms thereof the defendant levied upon the property theretofore attached by special officer R. M. Courtney, other than the property sold as perishable, and on July 23, 1912, sold said property to J. E. Barrack and Paul Ringseth for \$667.00, which sum was applied toward the satisfaction of said judgment, after deducting his fees for services rendered, and that he had a balance of \$90.60 then remaining in his possession; that at the time of the levy of the attach-

ment, the property, which was afterwards sold by him under the execution, was in the exclusive possession of the Russian Mining Company, and that they were the owners thereof at the time, and at the time of the levy of the execution it was in the possession of the United States Marshal (Tr. pp. 12-17).

For a second, further and affirmative answer and defense, he alleges the institution of an action in the Commissioner's Court for Fairbanks Precinct, at Chatanika, by C. E. Danforth, as plaintiff, to recover the sum of \$437.50, alleges the attachment of the same property described in his first affirmative answer, alleges the rendition of judgment in said action by the Commissioner on June 21, 1912, the service of the writ of execution on June 26, upon the same property levied on in the case of Barrack v. Russian Mining Company, and the application of said sum of \$90.60 which remained after satisfying the Barrack judgment, and alleges that at the time of the attachment, the property was in the possession of the Russian Mining Company, and at the time of the levy of the execution, it was in the possession of the defendant as United States Marshal (Tr. pp. 17; 22).

For a third affirmative answer and defense, the defendant Love alleged that the Russian Mining Company, on April 29, 1912, gave a bill of sale of certain property, being a portion of the property in dispute, to C. H. Ward, but retained possession thereof, and that the transfer was for the purpose of cheating and defrauding creditors of the Russian Mining Company; that on

June 11, 1912, the Russian Mining Company were indebted to J. E. Barrack and C. E. Danforth and others, and on said day, for the purpose of hindering, delaying and defrauding their creditors, said Ward executed a pretended assignment or release of the property formerly conveyed to him, to the plaintiffs in this action, and at the time said assignment was made the property had already been attached; that the Russian Mining Company were insolvent and that the bill of sale to Ward was fraudulent, in that no actual or continuous change of possession of the property pretended to have been transferred had ever taken place, and the Russian Mining Company continued to use a portion of the property alleged to have been conveyed to Ward, and that the provisions, etc., described in plaintiff's complaint were purchased subsequent to the transfer to Ward; that both transfers were void as respects J. E. Barrack and C. E. Danforth (Tr. pp. 22-26).

For a fourth separate and further affirmative answer and defense, said defendant pleaded that no trust was ever created in plaintiffs in the action, by an instrument in writing, as prescribed by law, and any claims made by the plaintiffs were without right and void (Tr. p. 26).

On April 24, 1913, the plaintiffs filed their reply to the separate answer of the defendant Courtney, denying each and every matter set forth in the affirmative defenses (Tr. pp. 26-27).

On April 24, 1913, the plaintiffs filed their reply to the answer of H. K. Love, denying each and every matter contained in the first affirmative defense, with the

exception that the property described in the first affirmative defense is embraced in the list of personal property claimed by the plaintiffs; denying each and every matter in his second affirmative defense, except that they make the same admission in regard to the personal property as that in the answer to the first affirmative defense; denying each and every matter contained in the third affirmative defense and all matters and things contained in the fourth affirmative defense; and setting up a further reply to the first and second affirmative defenses, in which they allege that the Russian Mining Company had no interest in any of the property attached by the defendants, at the time said attachment was levied, that the commissioner had no authority to issue the writs of attachment or execution, and that the same were void and that the commissioner had no jurisdiction of the Russian Mining Company and no authority to appoint R. M. Courtnay a special officer.

The evidence developed the following facts:

That prior to April 30, and up until June 11, 1912, the Russian Mining Company were engaged in mining operations on No. 1 below Discovery on Chatanika, Fairbanks Recording District, and on April 30, 1912, executed and delivered to C. H. Ward a bill of sale of 200 cords of 16-foot and 4-foot wood, one 20-horsepower American hoist, pipes, hose, points, fittings, bucket and carrier and bucket block, all cables, flumes, sluice boxes, cooking range and dishes, situate on said mining claim (Tr. p. 33), as security for their indebtedness to him (Tr. p. 66) in the sum of \$1,250.00 (Tr. p. 71); that Ward left

the property in the possession of the vendors and permitted them to use it as their own and asserted no claim of ownership thereover, and put up no notices claiming it as his property (Tr. pp. 66; 70; 73); that Ward asked for the bill of sale as he feared the Russian Mining Company would be attached and he desired to secure his own claim (Tr. p. 71); that part of his indebtedness was represented by option to sell certain machinery to the Russian Mining Company for \$1,000.00 (Tr. p. 72); that on June 11, 1912, the Russian Mining Company was unable to pay its bills, attachments were threatened and Ward took back his machinery, upon which the Russian Mining Company had an option for \$1,000.00 (Tr. p. 72), and which was included as a part of the indebtedness for which the property was transferred, and after taking back said machinery, the indebtedness of the Russian Mining Company to Ward, for which the bill of sale was security, was the sum of \$250.00 (Tr. p. 72); that in the forenoon of the same day the plaintiffs desired to secure an attachment against the property of the Russian Mining Company for wages due them, but for some reason that does not appear were unable to secure such writ (Tr. pp. 67; 73); that Ward knew that Barrack and others were getting out an attachment against the property of the Russian Mining Company, so he proposed to the Russian Mining Company that he transfer his interests in the property covered by the bill of sale to the men (Tr. pp. 69; 73), and about 11 a. m. (Tr. p. 68) indorsed on his bill of sale the following:

“Chatanika, Alaska, June 11, 1912.. I the undersigned holding a bill of sale of mining property described in this bill of sale, do hereby release said property to the following laborers of the Russian Mining Company. They are to hold wood and machinery for wages due them. This release is given to Robert Serafino and Tom P. King who act as trustees for the others. (Signed) C. H. Ward. Witness: James M. White.”

That Ward merely released to plaintiffs whatever interest he had in the property, which was security for but \$250.00 (Tr. p. 72), as he had already taken his machinery back; that after the indorsement was made on the bill of sale, the men did nothing and made no effort to secure possession of the property (Tr. p. 68), and posted no notices claiming ownership (Tr. p. 51), and did nothing but “look around” (Tr. pp. 51-52); that about noon of the same day, approximately an hour or an hour and a half after said indorsement was made, the defendant Courtney, acting as a special officer in the case of Barrack v. Russian Mining Company, then pending in the Commissioner’s Court at Chatanika, came to the ground and attached all the property in dispute, as well as other property which was still in the possession of the Russian Mining Company (Tr. p. 68), put up notices of attachment (Tr. p. 47), nailed up the houses where machinery was located, and took the provisions away (Tr. pp. 38; 83); that the plaintiffs and the rest of the men then left and took no steps in regard to gaining possession of the property, and the

United States Marshal remained in possession thereof (Tr. p. 100); that at a later hour on the same day, the second attachment was levied on the property in dispute, in the case of Danforth v. Russian Mining Company (Tr. pp. 107-109);

That on June 18, 1912, judgment was rendered by default, in favor of the plaintiff, in each of the two actions in which writs had been issued (Tr. pp. 101; 116); that on June 21, 1912, execution was issued by the Commissioner at Chatanika, in the case of Barrack v. Russian Mining Company (Tr. p. 89), and on June 24, 1912, the execution was delivered to the defendant United States Marshal, and on June 26, 1912, he levied upon and offered for sale the property in controversy, together with other property of the Russian Mining Company, and after twice postponing the sale, on July 23, 1912, sold said property for \$667.00 (Tr. pp. 87-89); that on June 26, 1912, execution was issued in the case of Danforth v. Russian Mining Company, placed in the hands of the defendant United States Marshal, and by him executed by levying on the property of the Russian Mining Company, theretofore levied on in the case of Barrack v. Russian Mining Company, and the sale of said property was postponed upon the same dates and for the same periods as the sale in Barrack v. Russian Mining Company, at the request of J. E. Barrack, assignee of Danforth, until July 23, 1912; that it was found that after paying the Marshal's expenses and paying the prior judgment in the case of Barrack v. Russian Mining Company, there remained \$90.60 to apply on the

junior execution in the Danforth case (Tr. pp. 103-105);

That on June 29, 1912, after the property in controversy, with other property, had been seized under said executions by the defendant United States Marshal and offered for sale, the plaintiffs served on defendants a notice claiming title to the said property, by virtue of the bill of sale to Ward and the transfer of his rights thereunder to plaintiffs (Tr. pp. 62-64); and during the trial of the action plaintiffs' counsel admitted that the only claim the plaintiffs had to any of said property was under the bill of sale from Ward and the alleged taking possession of the property by plaintiffs (Tr. p. 38).

That on June 11, 1912, the Commissioner at Chatanika regularly appointed R. M. Courtnay a special officer to serve the attachments in the cases of Barrack v. Russian Mining Company and Danforth v. Russian Mining Company (Tr. pp. 99; 115), but the executions in both cases were levied by a deputy of the defendant H. K. Love (Tr. pp. 89; 104); that after the attachment was levied by R. M. Courtnay, he made an inventory of the property attached by him (Tr. pp. 91; 106); that on June 11, 1912, special officer Courtnay also served the summons on the Russian Mining Company (Tr. pp. 100; 115).

No evidence was introduced at the trial showing that an express trust was created in writing, signed by the Russian Mining Company, and assented to by the beneficiaries or the trustees. The plaintiffs introduced an instrument written in Russian, being a list of names, claiming same to be a list of the beneficiaries under the

trust (Tr. p. 60), and also attempted to introduce, for the purpose of proving the amounts due to various laborers, a list of names with the amounts set after them, but the evidence was excluded as incompetent (Tr. p. 59). The only evidence given at the trial as to the amounts due to any laborers working on the ground on June 11, 1912, for which the plaintiffs claim to be trustees, was the evidence of Carl Post that the Russian Mining Company owed him \$257.50 (Tr. p. 58), but no evidence was introduced to show a trust created for the payment of his claim; and plaintiff Serafino testified that there was \$200.00 due to him (Tr. p. 45). Plaintiffs also attempted to prove that the Russian Mining Company gave them a bill of sale of the cookhouse, groceries, etc., before the attachment was levied by special officer Court-nay (Plaintiffs' Exhibit 2, Tr. p. 36), but upon cross-examination the witness admitted that it was executed after the attachments were levied and the property was in the possession of the United States Marshal (Tr. pp. 48; 49; 50).

At the close of plaintiffs' case the defendants moved for a non-suit or directed verdict (Tr. pp. 83; 86), which was denied by the Court. The defendants then put in their case, the Court instructed the jury (Tr. pp. 128-137) and they retired, and on November 14, 1913, brought in a verdict against the defendants, in favor of plaintiffs, in the sum of \$575.00 (Tr. pp. 137-138).

On November 17, the defendants moved for a new trial (Tr. pp. 138-140), which motion was denied (Tr. p. 140). Judgment was entered on December 9, 1913

(Tr. pp. 142-144) ; bill of exceptions was presented within the time prescribed by law and the rules of Court and settled on March 11, 1914 (Tr. pp. 141-142). Petition for writ of error was filed and allowed on January 26, 1914.

The defendants contend (1) that there was no authority or evidence to justify the entry of any judgment against R. M. Courtney under any conditions; (2) that the alleged bill of sale to Ward was intended as a chattel mortgage and, as such, was, as against the creditors of the Russian Mining Company, void (a) because the possession was retained by mortgagor, and (b) because possession being retained by mortgagor, no affidavit of merits was attached to the mortgage and none of the provisions of the Alaska Code relative to its execution complied with; (3) that Ward, on June 11, 1912, only transferred to plaintiffs what interest he held in a void chattel mortgage, and that there was due from the Russian Mining Company to Ward at that time the sum of but \$250.00, and the plaintiffs received no other title; (4) that plaintiffs never went into possession of the property and that the Russian Mining Company were in possession at the time the attachment was levied; (5) that the defendants' possession under the writs of attachment was superior to any right of possession that had been obtained by the plaintiffs; (6) that plaintiffs failed to establish an express trust and the alleged trust under which they claim is void; (7) that plaintiffs failed to prove the amounts due to any persons for whom they allege they are trustees, and plaintiff Serafino only

proved that there was \$200.00 due him individually and \$257.50 due one Carl Post, who was not connected with said alleged trust by any competent testimony; (8) that from any theory or view of the case, the verdict of the jury was excessive; (9) that the Court should have granted a new trial, or required plaintiffs to remit all sums over and above the amount of the plaintiff Serafino's claim, if the Court was convinced that plaintiffs received any title until the transfer from Ward on June 11, 1912; (10) that plaintiffs' complaint fails to state a cause of action against defendants.

The plaintiff in error relies upon the following

Assignment of Error.

1. The Court erred in entering the judgment of date December 9, 1913, in the above entitled action;
2. The Court erred in overruling defendants' motion for new trial;
3. The Court erred in receiving and accepting the verdict of the jury, given, made and entered in the above entitled cause on November 14, 1913;
4. The Court erred in overruling defendants' request, at the conclusion of the plaintiffs' case, for non-suit and to dismiss said action;
5. The Court erred in refusing, at the conclusion of plaintiffs' case, upon the motion of the defendants, to direct the jury to bring in a verdict in favor of defendants;
6. The Court erred in entering any judgment against

the defendant, R. M. Courtney;

7. The Court erred in refusing defendants' motion to strike out certain evidence given by Baptiste Serafino, one of the plaintiffs, said testimony being as follows:

“Q. Now state what you did under those instructions as trustees that same day.

“A. Well, we went down on the claim and took possession of it.

“MR. CLARK: We object to that as calling for a conclusion and ask that it be stricken.

“THE COURT: The answer may stand.

“MR. CLARK: We save an objection.”

8. The Court erred in permitting the introduction of plaintiffs' Exhibit No. 3, over defendants' objection and exception, said exception and exhibit being as follows:

“MR. CLARK: We object, as we contend that there are names on there that do not belong there.

“THE COURT: The paper may be admitted for the purpose stated.

“(Marked Plaintiffs' Exhibit 3.)

“(Plaintiffs' Exhibit 3 is a list of names as follows:)

“Bozs Wucettih,

“Nick Cvietovich,

“Mike Zizich,

“Enan Honlob,

“Alexander Honob,

“Gob Ston,

“Alick ———,

“Tom King,

“Sam Falar,

“Nick Aldatoff,

“Shorn,

"Job Jankuwzki,

"Call Post,

"Baptist Serafino,

"Juan Mien Seki.

"MR. CLARK: We note an exception. (Exception allowed)."

Argument.

Section 551 of the Compiled Laws of Alaska provides as follows:

"Sec. 551. It shall be the duty of the Commissioner, upon the presentation for that purpose of any mortgage or conveyance intended to operate as a mortgage of goods and chattels, or a copy of any such instrument, and the payment of his fees, to indorse thereon the time of receiving the same, and to deposit such instrument or copy in his office, to be kept for the inspection of all persons interested."

Section 556, Compiled Laws of Alaska, provides as follows:

"Sec. 556. Every conveyance or assignment, in writing or otherwise, of any estate or interest in lands, or in goods, or things in action, or of any rents or profits issuing therefrom, and every charge upon lands, goods, or things in action, or upon the rents or profits thereof, made with the intent to hinder, delay, or defraud creditors or other persons of their lawful suits, damages, forfeitures, debts, or demands, and every bond or other evidence of debt given, action commenced, decree or judgment suffered, with the like intent, as against the persons so hindered, delayed, or defrauded, shall be void."

Section 557, Compiled Laws of Alaska, provides as follows:

“Sec. 557. Every grant or assignment of any existing trust in lands, goods, or things in action, unless the same be in writing, subscribed by the party making the same, or by his agent lawfully authorized, shall be void.”

Section 740, Compiled Laws of Alaska, provides as follows:

“Sec. 740. A mortgage of personal property is void as against creditors of the mortgagor and subsequent purchasers and incumbrancers of the property in good faith for value, unless—

“(1) The possession of such property be delivered to and retained by the mortgagee; or

“(2) The mortgage provide that the property may remain in the possession of the mortgagor and be accompanied by an affidavit of all the parties thereto, or, in case any party is absent from the precinct where such mortgage is executed, at the time of the execution thereof, an affidavit of those present and of the agent or attorney in fact of such absent party that the same is made in good faith to secure the amount named therein, and without any design to hinder, delay, or defraud creditors, and be acknowledged and filed as hereinafter provided.”

Section 743, Compiled Laws of Alaska, provides as follows:

“Sec. 743. Every mortgage of personal property, together with the affidavits of the parties thereto or a copy thereof, certified to be correct by the person before whom the acknowledgment has been made, must be filed in the office of the Recorder of the

precinct where the mortgagor resides, and of the precinct where the property is at the time of the execution of the mortgage, or, in case he is not a resident of the district, then in the office of the Recorder of the precinct where the property is at the time of the execution of the mortgage; and the Recorder must, on receipt of such mortgage or copy, indorse thereon the time of receiving the same, and file and keep the same in his office for the inspection of all persons, and shall enter in a book, properly ruled and kept for that purpose, the names of all the parties—the names of the mortgagors to be alphabetically arranged,—the consideration thereof, the date of its maturity, and the time of filing the same.”

Section 972, Compiled Laws of Alaska, provides as follows:

“Sec. 972. The marshal or deputy marshal to whom the writ is delivered shall execute the same without delay, as follows:

“First. Real property shall be attached by leaving with the occupant thereof, or if there be no occupant, in a conspicuous place thereon, a copy of the writ certified by the marshal.

“Second. Personal property capable of manual delivery to the marshal, and not in the possession of a third person, shall be attached by taking it into his custody.

“Third. Other personal property shall be attached by leaving a certified copy of the writ, and a notice specifying the property attached, with the person having possession of the same, or if it be a debt, then with the debtor, or if it be rights or shares in the stock of an association or corporation, or interest or profits thereof, then with such person or officer of

such association or corporation as this Code authorizes a summons to be served upon."

Section 1843, Compiled Laws of Alaska, provides as follows:

"Sec. 1843. Whenever it appears to the Justice that any process or order authorized to be issued or made by this Code will not be served for want of an officer, such Justice may appoint any suitable person not being a party to the action to serve the same; such an appointment may be made by an indorsement on the process or order in substantially the following form, and signed by the Justice with his name of office: 'I hereby appoint A. B. to serve the within process, or order,' as the case may be."

Section 1875, Compiled Laws of Alaska, provides as follows:

"Sec. 1875. Every sale or assignment of personal property, unless accompanied by the immediate delivery and the actual and continued change of possession of the thing sold or assigned, shall be presumed prima facie to be a fraud against the creditors of the vendor or assignor, and subsequent purchasers in good faith and for a valuable consideration, during the time such property remains in the possession of said vendor or assignor."

I.

THE ORIGINAL BILL OF SALE FROM THE RUSSIAN MINING COMPANY TO WARD WAS INTENDED AS A MORTGAGE, AND, AS SUCH, WAS VOID AS TO ATTACHING CREDITORS OF THE RUSSIAN MINING COMPANY.

The bill of sale was intended to secure the payment

by the Russian Mining Company to Ward of \$1,250.00 (Tr. pp. 66; 72), and on June 11, 1912, the indebtedness was reduced to \$250.00 (Tr. pp. 72; 75; 81). The property remained in the possession of the Russian Mining Company at all times (Tr. pp. 66; 68).

Ward, a witness for the plaintiffs, testified as follows:

“Q. Where was the machinery and wood at the time you say you gave it to them?

“A. On One Below, Chatanika Flats.

“Q. In whose possession was it?

“A. It was in the Russian Mining Company's possession yet.” (Tr. p. 68.)

As a transfer of the title, the alleged bill of sale was void as against creditors of the Russian Mining Company.

Sec. 1875 Comp. Laws of Alaska, *supra*.

It was void as a chattel mortgage, as far as claims of creditors of the Russian Mining Company were concerned, because not executed with the formalities required by law, where the possession was retained by the mortgagor. (See Plaintiffs' Exhibit 1, Tr. pp. 33-34.)

Sec. 740 Comp. Laws of Alaska, *supra*.

Ward only transferred the interest he held in the personal property. He testified as follows:

“Q. So you considered that Serafino and King, when you turned it over to them as trustees—you considered you were simply releasing the claim you had on it as security for your claim; you were releasing that to them. A. I was.

“Q. So as to protect them on their wages. A. Yes.

“Q. And the only instrument that was executed by the Russian Mining Company to you was the bill of sale on the 29th of April, 1912? A. That was all.

“Q. And they continued to use the machinery just as they had before. A. They did.

“Q. They continued to burn up the wood that was on the ground. A. Yes.” (Tr. pp. 72-73.)

Ward knew the men were going to attach the identical property covered by his bill of sale and recognized their right so to do. He testified as follows:

“Q. And this bill of sale was executed by you and this property turned over to these trustees for the reason that they went to Commissioner Weiss out there for the purpose of getting an attachment and he refused to issue one. A. Yes sir.

“Q.. They intended to attach this identical property.

“A. They did. Yes.

“Q. And it was to prevent any costs accruing to the laborers or any expense to them, that you voluntarily turned it over to them and put them in your shoes.

“A. It was. (Tr. pp. 77.78.)

If Ward had no valid claim he could assert as against bona fide existing or attaching creditors of the Russian Mining Company, he transferred no greater interest to plaintiffs.

II.

THE ONLY WAY PLAINTIFFS COULD HAVE SECURED A TITLE OF ANY GREATER DIGNITY THAN THE TITLE TRANSFERRED BY WARD WOULD HAVE BEEN BY TAKING THE ACTUAL PHYSICAL POSSESSION OF THE PROPERTY, BETWEEN THE TIME WARD RELEASED ANY CLAIM HE HAD THEREON AND THE TIME THE ATTACHMENT WAS LEVIED.

No possession was taken by plaintiffs and the evidence on that point is not conflicting.

The plaintiff Serafino, on direct examination, testified as follows:

“Q. Did they attempt to do anything with this property after they turned it over to you?

“A. Who, the Russian Mining Company?

“Q. Yes sir. A. No sir.

“Q. What did you do when you got down there, you and the rest of the men.

“A. We started to gather up everything.

“Q. Did you commence to make a list of it?

“MR. CLARK: We object to the leading questions.

“MR. CLEGG: Q. What did you commence to do?

“A. Well, we tried to take a list of that stuff that was left there. Well, take—estimate things.

“Q. Took a rough estimate? A. Yes sir.

“Q. Of the list of stuff that was there. A. Yes sir.” (Tr. p. 37.)

But on cross-examination, he says:.

“Q. You didn’t measure the wood in June after they shut down mining, did you? A. No.

“Q. After Courtney told you to get out of the

bunkhouse, or out of the messhouse, you boys left the claim, didn't you? A. Yes sir.

"Q. You hadn't put up any notices before that, had you? A. No sir.

"Q. And you didn't put up any after that?

"A. No sir.

"Q. So after Courtnay told you you couldn't eat up the grub you boys went away and you got work elsewhere? A. Yes sir.

"Q. And none of you went back again, did you, until after the marshal sold the property? A. No sir. * * * *

"Q. After Mr. Ward gave you this paper in the cabin, what did you boys do just after that?

"A. We just went down on the claim.

"Q. You just went down and commenced to look around a little bit. A. Yes sir.

"Q. And you went up town, didn't you?

"A. I went up town afterwards, in the afternoon sometime.

"Q. And you saw Courtnay up town about 12 o'clock, didn't you?

"A. I couldn't say exactly, but I think it was about that time.

"Q. Right after Ward had signed this paper, you went over onto the claim. A. Yes sir.

"Q. And a little bit after that Mr. Courtnay came down and put up some notices. A. Yes sir." (Tr. pp. 51-52.)

Serafino, on direct examination, testified, over defendants' objection, that the men took possession of the claim (Tr. p. 36).

On this subject, Ward testified:

“Q. What did the men do between the time you say you turned it over to them and the time the attachment was levied. A. They did nothing.

“Q. *They just stood around there and did nothing.*

“A. *They were around there and did nothing.*

“Q. They didn’t stick up any notices of any kind on the wood or on the machinery, or anything of that kind?

“A. I believe they put up notices on the wood.

“Q. Do you know when those notices were put up?

“A. Directly afterward. I wouldn’t be certain of it because I was working at the time, but I think they did.

“Q. *Did you see them put them up?*

“A. *No sir.* But they told me they were going to put them up.

“Q. *You don’t know of your own knowledge whether they did or not?*

“A. *No. I don’t know whether they did or not.”*

(Tr. pp. 68-69.)

John Barrack, as a witness for the defendants, testified that he was on the ground immediately after the attachment was levied by Courtney and saw no notices put up by the men, and was on the ground for eight or ten days thereafter, saw some of them there for a couple of days, but that they were doing nothing (Tr. p. 119).

Carl Post, another witness, present when Ward made the assignment of his interests in the property covered by the bill of sale, was sworn as a witness for plaintiffs, but was not asked anything about what kind of possession was taken by the men (Tr. p. 56-58).

The foregoing is a summary of *all* the testimony concerning any change of possession of the property in controversy prior to the levy of the writ of attachment *and is not conflicting and conclusively* shows that the property in question was in the *possession of the Russian Mining Company* at the time the attachment was levied. We respectfully submit that it was an abuse of discretion on the part of the Court in refusing to grant a new trial and in refusing to grant a non-suit at the close of the plaintiffs' case.

For authorities as to what acts are necessary to constitute change of possession, see:

Allen v. Steiger, 31 Pac., 226-227;

Guthrie v. Carney (Cal.), 124 Pac., 1045;

Howe v. Johnson (Cal.), 40 Pac., 42;

Ruggles v. Cannedy (Cal.), 53 Pac., 911;

Taylor v. Malta Mercantile Co. (Mont.), 132 Pac., 550;

Dodge v. Jones (Mont.), 14 Pac., 707;

Stevens v. Erwin, 15 Cal., 503;

Ray v. Raynolds (Cal.), 9 Pac. 15;

Sweeney v. Coe et al. (Colo.), 21 Pac., 705;

Austin et al. v. Terry (Colo.), 88 Pac., 189-190;

Springer v. Kreuger (Colo.), 34 Pac., 269-271.

III.

THE LEVY OF THE WRIT OF ATTACHMENT BY SPECIAL OFFICER COURTNEY WAS VALID AND THE POSSESSION SO GAINED BY THE UNITED STATES MARSHAL WAS GOOD AS AGAINST THE CLAIMS OF THE PLAINTIFFS.

For authority of a Commissioner to appoint a special officer, see

Sec. 1843 Comp. Laws of Alaska, *supra*.

Courtney in levying the attachment nailed up the buildings (Tr. p. 83) where the property was stored, posted notices of attachment (Tr. p. 47) on the bulky property, and took away the provisions (Tr. pp. 37-38) and other property capable of being moved. The attachment was in accordance with the provisions of the laws of Alaska. See

Sec. 972 Comp. Laws of Alaska, *supra*.

The wrongful taking of the property is alleged to have been on June 11, 1912, when the attachments were levied, and all proof was directed to that date, and plaintiffs have elected to stand upon such taking as being wrongful. No claim is made by them that they were in possession when the property was seized on execution, and no question arises in the case at bar as to the validity of the executions or seizures thereunder.

IV.

THE ALLEGED ASSIGNMENT BY WARD TO THE PLAINTIFFS OF HIS ALLEGED INTEREST IN THE PROPERTY IN DISPUTE WAS IN EFFECT A RELEASE OF HIS CLAIM UNDER A VOID CHATTEL MORTGAGE ON THE PROPERTY.

Section 748, Compiled Laws of Alaska, provides as follows:

“The provisions of the foregoing sections of this chapter (Sections 740-743 supra) shall extend to all such bills of sale, deeds of trust and other conveyances of goods, chattels, or personal property as shall have the effect of a mortgage or a lien upon such property.”

On June 11, 1912, when Ward made the indorsements on the bill of sale (see page 9 of this brief), he recited:

“I, the undersigned, holding a bill of sale of mining property described in this bill of sale, do hereby release said property to the following laborers of the Russian Mining Company,” etc.

As he has already admitted that the bill of sale was merely held as security for an indebtedness, and as it was executed without the formality required by law as a protection against creditors, the effect of his indorsement was merely to release his mortgage on the property. It could not be construed as a creation of a trust on his part, and there was no consideration for his making the transfer to any person whomsoever, as he merely waived his unpaid claim of \$250 when he found that the laborers intended to attach the identical property covered by his alleged bill of sale.

A trust in personal property cannot be created orally.

Sec. 557, Compiled Laws of Alaska, *supra*.

There is no pretense of claim on the part of plaintiffs that a trust was created in any other manner than by the indorsement made by Ward on the bill of sale. Consequently, the moment Ward released his alleged lien on the property, it became subject to the claims of attaching creditors and was subject to be taken on attachment at the time the defendant Courtnay levied the writ of attachment on the property in dispute, unless the Russian Mining Company had transferred title thereto between the time Ward released his void claim on the property and the time the attachment was levied, and this is neither alleged nor proven. Even should the indorsement by Ward on the bill of sale be treated as an attempt to create a trust, the trust is void for uncertainty.

“The ‘certainty’ in a declaration of trust, which is necessary and sufficient to create a trust, has been construed to mean clear, explicit, definite and unequivocal expressions setting out the trust with such certainty that a court of equity may enforce its execution; and the element of certainty is especially necessary when the declaration of trust rests in *parol*. The rule requiring certainty is most frequently applied to the naming and defining of a beneficiary and the interest which he is to take, or the proportion in case there are several; but it is also applied to the designation of the property or subject matter of the trust, and the manner in which the trust is to be performed.”

39 Cyc., pp. 58-61.

Galligos Ex'rs v. Attorney General, 24 Am. Dec., 650.

From the endorsement made by Ward on said bill of sale, it is impossible to determine the beneficiaries under the alleged trust, or the proportionate share of each, if it were possible to identify them, as the assignment reads (referring to the assignment as set forth on page 9 of this brief), after reciting that he does release said property to the "following" members of the Russian Mining Company, "They are to hold wood and machinery for wages due them. This release is given to Robert Serafino and Tom P. King to act as trustees for the others." It is impossible to determine, without parol evidence, who the beneficiaries would be, the proportion that each would have in said alleged trust, or how the trust was to be executed, and in the trial of the action it was clearly demonstrated that the alleged trustee could not identify the beneficiaries.

In the case at bar, the trust could only have been created by the Russian Mining Company, and if created by them, was created by parol and was void.

Sec. 557, Compiled Laws of Alaska, *supra*.

Again, conceding, for the sake of argument, that the indorsement by Ward was a valid creation of a trust, if properly executed, it was void by reason of the failure to transfer possession of said property to the trustees.

"Except where the creator of a trust constitutes himself trustee, it is indispensably necessary to the creation of an express trust that the creator do everything which can be done, considering the character of the property comprising the trust, to transfer the property to the trustee in such mode as will be

effectual to pass the legal title.”

39 Cyc., p. 76.

Bannock v. Magoon et al., 125 S. W., 535.

Title to personalty cannot, under the laws of Alaska, be transferred by bill of sale without the actual change of possession of the property. Ward was not the owner of the property and could not transfer the same. The Russian Mining Company did not attempt to sell the property or transfer same or give the alleged trustees possession of the property in such manner as would pass the title to said trustees, as against the claims of attaching creditors.

See authorities cited under subdivision 2 of this brief, page 25, *supra*.

There is no claim made by the plaintiffs that the Russian Mining Company did or performed any act or thing on the 11th day of June, 1912, to pass title to the alleged trustees, other than acquiescing in the indorsement made by Ward on the bill of sale.

If the endorsement made by Ward was effectual for any purpose (if it is not treated as a release of a mortgage void as to creditors), then it would merely be an assignment of a void chattel mortgage upon which there was due but two hundred fifty dollars, and that was all the interest the alleged trustees could receive therein.

If a transaction of this character were permitted to stand as the creation of a trust, there would be nothing to prevent dishonest mining operators from executing fraudulent chattel mortgages, bills of sale, or other alleged conveyances, and then have the holders transfer

same to irresponsible persons, who could thereupon dispose of said property for such sums as they saw fit and convert the proceeds thereof to any purpose except the settlement of the debts of the debtor, and the creditors would have no method whatsoever of ascertaining whether or not the funds realized from the sale of said property were legitimately disposed of. An alleged trustee could, under those circumstances, sequester all the available assets of a failing operator, convert them into cash, and pay the cash over to the fraudulent grantor.

We respectfully submit that the law never intended that a trust should be created in personalty, unless all the formalities ordinarily incident to trusts are strictly complied with, as they are usually intended to favor some particular classes or groups of creditors over others and should be hedged about by all necessary safeguards to protect the creditors of the debtor, who are not beneficiaries under the trust. We submit that the complaint in this action does not set forth a cause of action against the defendants, as it does not allege the creation of a valid trust under the laws of Alaska, for the reasons hereinbefore set forth, and that there was *no evidence* to sustain the verdict of the jury, and the Court should have granted a new trial to the appellants herein.

V.

THE ENTRY OF ANY JUDGMENT AGAINST THE DEFENDANT COURTNAY WAS ERRONEOUS.

Courtney was appointed a special officer by the Commissioner and ex-officio Justice of the Peace, under the authority of Sec. 1843, Compiled Laws of Alaska, supra, for the purpose of levying attachments in two cases, and when the levies were completed his duties ended and his authority and control over the property terminated. He was not in possession of the property in dispute, nor was the same under his control when demand was made by the plaintiffs for the return thereof, as his limited control over the property was taken away prior to said time, by the law under which he was appointed.

VI.

THE COURT SHOULD HAVE GRANTED DEFENDANTS' MOTION TO STRIKE OUT THE TESTIMONY OF THE PLAINTIFF SERAFINO, WHEN HE TESTIFIED TO A LEGAL CONCLUSION, AS SHOWN IN THE SEVENTH ASSIGNMENT OF ERROR, PAGE 15 OF THIS BRIEF.

One of the principal, if not the most important, question involved in the trial of the case at bar was as to the possession of the personal property in dispute, on the 11th day of June, 1912, and that question was primarily a question of fact to be determined by the jury upon the evidence and proper instructions of the Court. What might constitute taking of possession to support one form of action would be vastly different from the acts neces-

sary to constitute such an actual, physical change of possession necessary to effectually carry title to personal property as against the claims of *bona fide* attaching creditors. The evidence adduced clearly shows that no possession was taken by the plaintiffs at the time in question, and the statement was purely a legal conclusion not justified by the facts in the case and fatally prejudicial to defendants under the instructions given by the Court.

The admission of Plaintiffs' Exhibit 3 (page 15 of this brief) was likewise erroneous and prejudicial to the defendants, as it was obviously introduced for the purpose of misleading the jury into believing that the beneficiaries under the alleged trust were known to the trustee and that all acts had been completed at the time the alleged trust was created, necessary to constitute a valid trust in personal property. The evidence respecting the list of names described in said exhibit was that it was a "list of names" and nothing more, and the list itself was in the Russian language.

The plaintiffs in error respectfully submit that if a transaction such as the one involved in this action, which was obviously intended to defeat *bona fide* creditors of the Russian Mining Company, is declared to be valid, the duties of a United States Marshal in levying attachments will be extremely hazardous, and the protection that is afforded to creditors by the laws relative to chattel mortgages, trusts, etc., as provided by Congress for the government of Alaska, will be practically nullified.

WHEREFORE, Plaintiffs in Error pray that the case at bar be reversed and the judgment heretofore rendered by the Court be set aside.

Respectfully submitted,

McGOWAN & CLARK,

Attorneys for Plaintiffs in Error.

Dated Fairbanks, Alaska,

October 8th, 1914.

**United States
Circuit Court of Appeals
For the Ninth Circuit.**

ANDREW CLAUSS, VICTOR ENGINGER, W. A. GRUBB,
JOSEPH HAMM, K. HALTER, L. SCHOTT, L. LAIT,
E. W. CLARK, JEAN A. GOURSELLE, M. C. BROOKE,
H. L. BROOKE, JESSE W. OLNEY, LILLY M.
STEWART, THEODORE B. WILCOX, F. L. SHULL
and ALVIN J. WHITMAN,

Appellants,

vs.

PALMER UNION OIL COMPANY, a Corporation, FRANK
L. BROWN, LEWIS A. HILBORN, GEORGE L.
WALKER, CHARLES E. LADD, GAVIN McNAB, H.
C. STRATTON, and GEORGE I. STEWART, as
Directors of said PALMER UNION OIL COMPANY
and in Their Individual Capacities, FRANK L. BROWN,
J. C. KEMP VAN EE, LEWIS A. HILBORN, H. C.
STRATTON and CHARLES E. LADD, as Directors of
PALMER OIL COMPANY, a Corporation, and in Their
Respective and Individual Capacities, ANGLO-CALI-
FORNIA TRUST COMPANY, a Corporation, and
PALMER OIL COMPANY, a Corporation,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for
the Northern District of California, Second Division.

Filed

JUL - 1 1914

F. D. Monckton,

United States
Circuit Court of Appeals
For the Ninth Circuit.

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JOSEPH HAMM, K. HALTER, L. SCHOTT, L. LAIT,
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Directors of said PALMER UNION OIL COMPANY
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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

	Page
Affidavit of Gavin McNab.....	67
Amended Bill of Complaint in Equity.....	1
Assignment of Errors.....	85
Attorneys, Names and Addresses of.....	1
Bill of Complaint in Equity, Amended.....	1
Bond on Appeal	90
Certificate of Clerk U. S. District Court to Transcript of Record on Appeal.....	98
Citation on Appeal (Original).....	100
Decree Dismissing Amended Bill of Complaint..	72
Docket, United States District Court.....	93
Marshal's Return on Subpoena ad Respondendum	41
Motion of Anglo-California Trust Company to Dismiss Amended Bill of Complaint.....	51
Motion of Frank L. Brown, Lewis A. Hilborn, George L. Walker, Charles E. Ladd and H. C. Stratton to Dismiss Amended Bill of Complaint	52
Motion of J. C. Kemp Van Ee to Dismiss Amended Bill of Complaint.....	57
Motion of Palmer Union Oil Company to Dismiss Amended Bill of Complaint.....	43

Index.	Page
Motion of George I. Stewart and Gavin McNab to Dismiss Amended Bill of Complaint....	47
Motion to Amend Order of March 2, 1914; to Va- cate Decree of March 4, 1914, and to Amend Amended Complaint	73
Names and Addresses of Attorneys.....	1
Notice of Motion of Defendants Frank L. Brown et al. for an Order Vacating Decree <i>Pro</i> <i>Confesso</i>	64
Notice of Motion of Defendant Palmer Union Oil Co. for an Order Vacating Decree <i>Pro</i> <i>Confesso</i>	60
Opinion and Order Denying a Motion for Leave to File an Amended Bill of Complaint....	79
Opinion on Motion to Dismiss Amended Bill of Complaint	69
Order Allowing Appeal	88
Order Denying Motion to Amend Order of March 2, 1914, etc.....	81
Order Dismissing Suit.....	71
Order Enlarging Time to June 8, 1914, to File Record on Appeal, etc.....	103
Order Granting Motions to Vacate Order Taking Amended Bill <i>Pro Confesso</i> ; and Vacating Former Order, etc.....	68
Order <i>Pro Confesso</i>	58
Petition for Allowance of Appeal.....	83
Praecipe for Transcript.....	97
Return on Service of Writ.....	41
Subpoena Ad Respondendum.....	40

Names and Addresses of Attorneys.

JESSE OLNEY and JOHN E. BENNETT, Esqrs.,
Humboldt Bank Bldg., San Francisco, California,

Attorneys for Appellant.

GAVIN McNAB, Merchants National Bank Bldg.,
San Francisco, California,

R. P. HENSHALL, Esq., Merchants National Bank
Bldg., San Francisco, California,

ROBERT R. MOODY, Esq., Crocker Bldg., San
Francisco, California, and

BRONTE M. AIKINS, Esq., Mills Bldg., San Francisco,
California,

Attorneys for Appellees.

*In the District Court of the United States in and for
the Northern District of California, Second Division.*

No. 45—EQ.

ANDREW CLAUSS,

Plaintiff,

vs.

PALMER UNION OIL COMPANY, a Corporation
et al.,

Defendants.

Amended Bill of Complaint in Equity.

To the Honorable the Judges of the District Court
of the United States in and for the Northern
District of California, Second Division, in Chancery Sitting:

Your orator, Andrew Clauss, is a resident and citizen of the State of Ohio, and on the 1st day of October, 1911, was the owner and holder of one thousand shares of the capital stock of the defendant Palmer Oil Company, and at all times since said date has been and now is the owner and holder of said one thousand shares of said stock, by leave of Court first had and obtained, brings this his Amended Bill of Complaint on behalf of himself and all other persons similarly situated and for the use and benefit of said Palmer Oil Company against Palmer Union Oil Company, a corporation organized and existing under and by virtue of the laws of the State of California, and a citizen of said State of California, having its principal place of business at Sisquoc, Santa Barbara County, California, Palmer Oil Company, a corporation organized and existing under and by virtue of the laws of the State of California, and a citizen of said State of [1*] California, having its principal place of business at Sisquoc, Santa Barbara County, California, Anglo-California Trust Company, a corporation organized and existing under the laws of the State of California, and a citizen thereof, having its principal office and place of business in the city of San Francisco, in the State of California, and resident in the Northern District thereof, Frank L. Brown, Lewis A. Hilborn, George L. Walker, Charles E. Ladd, Gavin McNab, H. C. Stratton and George I. Stewart, directors of said Palmer Union Oil Company, hereinafter called "Union Company," all whereof are citizens of said

*Page number appearing at foot of page of original certified Record.

State of California residing within the Northern District of California, save and except said Ladd, who is a citizen and resident of the State of Oregon, and also the said several parties in their individual capacities, also Frank L. Brown, J. C. Kemp Van Ee, Lewis A. Hilborn, H. C. Stratton and Charles E. Ladd, as directors of said Palmer Oil Company, hereinafter called "Palmer Company," or trustees thereof if said corporation be defunct, also against the several parties in their individual capacities.

Your orator further shows that the questions involved, and the relief demanded in this suit, are of common and general interest to many persons, to wit, to all the stockholders of said Palmer Company, constituting a class so numerous as to make it impracticable to bring them all before the Court in this suit.

I.

That heretofore, to wit, on or about the 21st day of October, 1911, said Palmer Company was a corporation organized and existing as aforesaid, then having its principal place of business in the City and County of San Francisco, State of California aforesaid, and was capitalized at two million shares of capital stock, of the par value of one dollar each, all whereof were issued and outstanding, of which shares plaintiff [2] herein was the owner of one thousand. That on said date said Palmer Company was the owner in fee of 720 acres of land, and of a lease of 160 acres of land, said lease enduring for twenty years from the date thereof, which was about the 23d day of March, 1905, with privilege of re-

newal, at a ten per cent royalty upon all oil taken therefrom, being 880 acres of land in all, said lands situate and lying in the Santa Maria Oil fields district, in Santa Barbara County, California, near the town of Sisquoc, in said county, and all of said lands were proven to the production of oil. That at said time the said Palmer Company had upon said lands eight wells of great depth, of which five were producing oil in the aggregate of 1,800 barrels per day, and two of said wells were flowing wells whose nominal production was 700 barrels each per day. That said property was further improved with four 55,000 barrel steel tanks, five 10,000 barrel steel storage tanks and earth reservoirs to be used in emergencies, the total oil storage upon said property being approximately 1,000,000 barrels, all of which were connected by a system of pipe-lines for facilitating discharges and delivery of oil into and from said storage. That the said property was further equipped with a battery of five 70 horse-power boilers in a central plant, from which plant steam was distributed to various parts of the property for power purposes, and an electric light plant furnished electricity for light purposes, and water was furnished from two wells drilled upon the land providing abundance of water for steam and all other purposes, bank and boardng houses, and barn and other buildings, furnishing ample accommodation for all men and beasts employed upon said property. That said Palmer Company had on hand in said storage 509,500 barrels of oil, valued at 40 cents per barrel, aggregating 203,800 dollars, and possessed

accounts receivable amounting to 111,694.65 [3] dollars, and cash in hand 31,623 dollars, aggregating 347,118.44 dollars of current assets, and a surplus balance over its current liabilities of 228,254.58 dollars, after having during said year 1911 spent in improving its property the sum of 208,394.35 dollars. Said Palmer Company had earned during the fiscal year of 1911 a profit of 308,470.40 dollars, and therefrom had paid dividends to its stockholders of 219,-879.24 dollars. That during the year prior, of 1910, said company had earned a profit of over 355,272.10 dollars from which it had paid dividends of 188,-220.99 dollars. That on said date, October 21st, 1911, said Company had contracts with responsible concerns for delivery of large quantities of oil at 50 and 55 cents per barrel and was on August 31st, 1911, behind in its deliveries with said concerns to the extent of 2,227,733 barrels of oil. Up to said 21st day of October, 1911, dividends upon the outstanding stock of said Palmer Company had been regularly declared, and paid monthly, from the profits thereof, for two years, at a rate of one cent per share per month, and said company at such time was in condition to continue paying such dividends, indefinitely. That the assets of said Palmer Company were on said 21st day of October reasonably worth and of the value of two million five hundred thousand dollars (\$2,500,000), and the stock of said Palmer Company was then bid for on the public markets at one dollar, or thereabouts, per share and was reasonably worth that amount.

II.

Your orator, upon information and belief, further alleges that on said October 21st, 1911, and prior thereto, all of the defendants in this action except said Palmer Company, and except said Anglo-California Trust Company, conspired and confederated together for the purpose and with the design of securing to themselves, and to divers other persons to your orator unknown, and [4] for their own benefit all of the said property of said Palmer Company and their minority holdings of the stock of said Palmer Company, without giving or paying anything of substantial value therefor, and thereby to deprive and defraud the said Palmer Company, and the minority stockholders thereof, of all interest in said property. And your orator shows that in pursuance of said conspiracy and as one of the means and instruments of carrying out and accomplishing the same and their said designs aforesaid, that prior to said 21st day of October, 1911, the aforesaid directors of said Union Company had organized and incorporated said Union Company, with an authorized capital stock of six million dollars, divided into six million shares of the par value of one dollar per share, none of which had been subscribed or paid in excess of a nominal sum sufficient for organization purposes. That prior to said date said defendants Brown and Walker, and as your orator is informed and believes other of said Union Company directors whose names are to your orator unknown and other persons, stockholders of said Union Company, acting in concert with said Brown and Walker, had ac-

quired possession of one hundred and sixty acres of land in Ventura County, California, lying four miles north of the town of Santa Paula in said county, but whether the same was acquired under lease or in fee your orator has no information, also had acquired a lease upon 40 acres of land in Kern County, California, lying in Section 23, Range 23 East, M. D. B. & M., the region of said last-mentioned land being known as the Midway Oil Field. That said Santa Paula property contained four old shallow oil wells, all of which were unprofitable to pump, and two wells incompletely drilled, one completed well and one well partially bored. That said completed well, your orator is informed and believes and alleges, produced [5] oil but in quantities not to exceed one hundred and fifty (150) barrels per day, but no other of said wells upon either of said tracts was on said date producing, or being bored, and your orator is informed and believes and alleges that no well or wells upon either of said tracts has since been operated. That said lands were by said defendants transferred unto Paula Oil Company, a corporation organized and existing under the laws of the State of California, whereof said Brown was president and said Walker was secretary in exchange for capital stock of said corporation; that said Paula Company never, at any time, had any property or assets of more than slight or nominal value except the aforesaid land, and thereafter and prior to said 21st day of October, 1911, said defendants being then and there the owners and holders or in control of two-thirds of the issued and outstanding capital stock of

said Paula Oil Company, caused said lands, and all other assets of said Paula Oil Company, to be transferred by said Paula Oil Company to said Union Company and to be received by said Union Company, the consideration paid therefor by said Union Company to said defendants being capital stock of said Union Company, the same being paid through said Union Company passing said stock to said Paula Oil Company and the amount whereof your orator is informed and believes, was one million two hundred thousand shares of said Union Company stock. That said two tracts of lands, and all assets of said Paula Oil Company, were, as your orator believes and alleges, on or about said 21st day of October, of a value not to exceed forty thousand (40,000) dollars.

III.

Your orator further alleges that, in pursuance of said conspiracy, and as another of the means and instruments of carrying out and accomplishing the same, and their said designs [6] aforesaid, prior to said 21st day of October, 1911, said defendants Brown, Hilborn, Kemp Van Ee, Stratton and Ladd acquired the fee of 880 acres of land in said Santa Maria field, a part of which enjoined on the north the 160 acre or Blockman lease tract of said Palmer Company. That said lands were by said defendants transferred to Palmer Junior Oil Company, a corporation organized and existing under the laws of California, whereof said Brown was president, said Hilborn was vice-president, said Kemp Van Ee was second vice-president, said Stratton was secretary

and said Ladd was director. That the consideration paid said defendants by said Palmer Junior Oil Company for said transfer was capital stock of said company, the amount being, as your orator is informed and believes, fifty-one per cent thereof, the balance remaining in the treasury of said company. That said land was on said 21st day of October, 1911, and has thereafter at all times been unproved to oil; that two wells were sunken upon said lands by said Palmer Junior Oil Company and no oil was found thereupon, which said lands were all the property or assets owned by said Palmer Junior Oil Company, at any time. That prior to said 21st day of October said Palmer Junior Oil Company, at the instance and direction of said Brown, Hilborn, Kemp Van Ee, Stratton and Ladd, together with all assets of said Palmer Junior Oil Company, was sold to said Union Company, and was by said defendants acting as directors or stockholders of said Union Company, purchased by said Union Company, the consideration therefor being capital stock of said Union Company; and your orator is informed and believes and alleges that one million shares of the capital stock of said Union Company was so paid for said land and assets which said land and assets were not at such time worth to exceed one hundred thousand dollars.

[7]

IV.

Your orator further alleges that, in pursuance of said conspiracy, and as another of the means and instruments of carrying out and accomplishing the same, and their said designs aforesaid, prior to said

21st day of October, 1911, said Brown and others of said directors of said Union Company, and of said Palmer Company, whose names are to your orator unknown, acquired an option to purchase for the sum of two hundred thousand dollars, as your orator is informed and believes, all that tract of land lying in said Santa Maria oil field, being Section 13 and a part of Section 12, in said field, comprising in all 1180 acres of land or thereabouts. That thereafter said parties incorporated Palmer Senior Oil Company, a corporation under the laws of the State of California, and thereafter in consideration of capital stock issued to them by said corporation said defendants transferred said option to said Palmer Senior Oil Company, which said option was all the property or assets owned by said Palmer Senior Oil Company. Thereafter and prior to said 21st day of October, 1911, said Palmer Senior Oil Company, at the instance and direction of said defendants, directors of said Union Company, transferred all the assets of said corporation including said option to said Union Company, and said defendants, in their capacity of directors of said Union Company, caused said Union Company to purchase the same; that in addition to this option said Palmer Senior Company had no property or assets of any value, at any time, of more than slight or nominal value. That the consideration paid said Palmer Senior Oil Company by said Union Company for said option and assets was capital stock of said Union Company, and your orator is informed and believes that one million seven hundred and fifty thousand shares of said Union

Company stock was so paid for said option, that neither said Palmer Senior nor said Union [8] have ever paid anything on account of said option, as your orator is informed and believes, and so charges the fact to be, but said Union Company has mortgaged all of its lands, and attempted to mortgage the lands aforesaid belonging to said Palmer Company, attempted to be acquired by said Union Company from said Palmer Company, as hereinafter set forth, to secure the payment of the same. That said lands and all thereof were and ever since have been so called "wild-cat" lands, were and are unproven to contain oil, and possessed and do now possess no other value than grazing lands. That the price agreed to be paid for said lands in said option largely exceeded the value of said land, and the said option was of no value whatever and was utterly worthless.

V.

Your orator further alleges that, in pursuance of said conspiracy, and as another of the means and instruments of carrying out and accomplishing the same, and their said designs aforesaid, that on said 21st day of October, 1911, said Union Company possessed no assets, or more than slight or nominal value, except the above matters and things, so acquired from said Paula Company, said Palmer Junior Company and said Palmer Senior Company above described, all of which did not exceed the sum or value of \$140,000, and that it had issued and there was outstanding 3,950,000 shares of the said Union Company stock so paid or given therefor, and the shares of the stock

of said Union Company were not worth more than about two and one-half cents per share, while, on said date, the shares of the stock of said Palmer Company, being regularly listed on the San Francisco Stock and Bond Exchange, were quoted thereon at 87½ cents a share, and twenty days before said date and before the designs of said defendants, the directors of said Union Company and said Palmer Company had become generally known to the public, were quoted on said exchange at 105 bid, 110 asked, [9] and shortly before September 1st, 1911, had sold on said exchange at prices ranging from \$1.50 to \$1.85 per share. And further your orator alleges, upon information and belief, that there were issued, from time to time, to the aforesaid directors respectively of said Union Company, and to others for their use and benefit, large numbers of shares of the stock of said Union Company for alleged services as officers of said Union Company, and for the so-called promoting of said Union Company, the exact number of which is unknown to your orator, but upon information and belief your orator alleges, exceeding one million shares, which said services and said promoting, your orator alleges were and are of no value whatever, and that the said shares so issued were issued and delivered to said directors of said Union Company without any valuable or lawful consideration therefor whatever. Your orator further shows that after having acquired to said Union Company all and several the said tracts and parcels of lands, the said Brown, Hilborn, Kemp Van Ee, Stratton and Ladd, directors of said Palmer Com-

pany and constituting a majority of said board of directors, being also at said time, except said Kemp Van Ee, directors of said Union Company and comprising a majority of the board of directors of said last-named company, and being at such time including said Kemp Van Ee also owners or holders of large number of shares of the issued and outstanding capital stock of said Union Company, to wit, two-thirds of all thereof, and also of a quantity of capital stock of said Palmer Company, the quantity of which is to your orator unknown, wrongfully and unlawfully concerted and conspired to defraud the holders of the capital stock of said Palmer Company other than themselves and those stockholders of said Palmer Company who at such time had greater interests in the stock of said Union Company than they possessed in said Palmer Company, out of their property and interest in said Palmer Company, [10] and so conspiring caused various false statements to be made to the minority stockholders of said Palmer Company whereby it was represented to said minority stockholders that great necessity existed for said Palmer Company to provide sea transportation for its oil and to provide capital for additional drilling of wells and further development of its property. That rather than stop the payment of dividends upon said Palmer Company stock the officers and directors of said Palmer Company had thought it advisable to accept from said Union Company an offer made by said Union Company to said Palmer Company, of merger of the properties of said Palmer Company with the properties of said

Union Company, and that the larger stockholders of said Palmer Company, aggregating about two-thirds of the issued capital of said company, to whom the matter of said merger had theretofore been submitted, had given their hearty approval of said merger and had signed an agreement therefor similar to a form of agreement thereupon offered by said directors to said minority stockholders, accepting the terms of said proposed merger; that it was further represented as aforesaid that said Union Company controlled 1830 acres of rich proven oil lands immediately adjacent to said Palmer Company properties, as well as producing properties in Ventura and Midway districts; that the basis of such proposed merger was for said Union Company to give to the stockholders of said Palmer Company two million dollars of its six per cent twenty year gold bonds of an issue of three million dollars of bonds of said Union Company and two million dollars of the capital stock of said Union Company in payment for all the assets of said Palmer Company. That the said transaction would insure the stockholders of said Palmer Company six per cent annual income on their bonds and a first lien on all the properties of both companies, thereby absolutely protecting said Palmer Company stockholders in their investments in [11] said property; and that by giving to said Palmer Company stockholders a like amount of stock of said Union Company as they held in said Palmer Company, their holdings would become practically doubled in a company that would have ample securities in its treasury for the further de-

velopment of the combined properties and for the necessary transportation and manufacturing facilities incident to the utilization of the products of the oil industry and the marketing of the same. That all and several the said statements and representations, your orator is informed and believes and so alleges, were false, and were then and there known to be false by said directors of both of said companies. Your orator alleges it to be a fact, and that each and all of the directors of both said Union Company and said Palmer Company then and there knew it to be a fact, that said Palmer Company had no need whatever for further or additional undeveloped oil lands; and that it possessed a tract of 880 acres of land as aforesaid, on which there were but eight wells, and there was ample surface upon said lands whereupon to sink all the wells which it would ever have been practicable for said company to drill; and that no necessity whatever existed for said Palmer Company providing sea transportation for its oil, or if such necessity existed, said company had ample means at hand for providing such transportation from its own resources; and that there was no necessity for providing additional capital from sources outside the profits of said company, for drilling additional wells and further developing the property of said company, and that there was no necessity for drilling such wells or for the further development of its property, and that such desirability as existed for additional wells, or extended facilities should have been met by the residue of profits yielded by said wells after said dividends had

been paid, the yield of its said wells being ample to provide said company [12] with all needful funds for all such further development as would be desirable, commensurate with the proper and business-like management of said property, and at the same time to continue paying the usual dividends of one cent per share per month upon its outstanding stock. That it was false that the merger of said properties as aforesaid was to be preferred rather than stop paying dividends upon said Palmer Stock, but that there was no necessity of stopping dividends upon the stock of said Palmer Company, but upon the said merger being effected as hereinafter stated, all dividends or income to the stockholders of said Palmer Company actually did stop, and such stockholders have never since received any dividends, interest, or income from said property whatsoever. That it was false that at such time, the said 21st day of October, 1911, about two-thirds of the stockholders of said Palmer Company had consented to said merger, but that a much less number had so consented, and those persons consenting were persons who owned larger interests in said Union Company than they did in said Palmer Company, or were persons who had been wrongfully induced to give their signatures to such proposed merger by the foregoing false representations made to them by the defendants herein, and others whose names to your orator are unknown acting and confederating with said defendants and owning larger holdings of stock in said Union Company than they possessed in said Palmer Company. That said Union Company did not at

said time, or at any time, control 1130 acres of "rich proven oil lands" immediately adjacent to the Palmer Company's properties, but controlled an area adjacent to said properties of less than 1130 acres, and said owned or controlled lands were not rich nor proven to contain oil; that the statement that said Union Company controlled producing oil properties in the Ventura district was false and misleading. That [13] your orator is informed and believes and alleges that the production of said Ventura wells did not pay the cost of pumping, and said property was entirely worthless for oil production. Your orator alleges that the said transaction would not insure the stockholders of said Palmer Company six per cent annual income on their bonds, as represented by said schemers, viz.: said directors of said Union Company and of said Palmer Company, that after having procured from said stockholders, by said false representations, their consents to said transfer of assets of said Palmer Company, said schemers proposed to continue in the control of the boards of directors of both said Palmer and said Union Companies, and intended that through such control they would thereafter withhold said bonds from said Palmer Company stockholders, and never let such bonds pass out of their own possession, and thereafter to deliver up said bonds to said Union Company and cancel the same as hereinafter set forth, and refuse to deliver said Union Company stock to said stockholders, thus defrauding and depriving said stockholders of said Palmer Company of all property in said Union Company whatsoever.

VI.

And your orator further alleges that said directors of said Palmer Company and of said Union Company, by said false and fraudulent representations, pretended to have secured the consent of the holders of two-thirds of the capital stock of the said Palmer Company to the sale of all the assets of said Palmer Company to said Union Company, and said transfer thereof, on the terms aforesaid, was actually made, by said Palmer Company to said Union Company, and said Union Company, on or about said October 21st, 1911, received and entered into possession of the same, and has continued in possession thereof to this date, claiming to be the lawful owner thereof. [14]

VII.

That such transfer was an outrage and imposition upon the interest of the minority stockholders of said Palmer Company, and was in fraud of such stockholders and their said interests. That all and several the properties of said Union Company were of no use or value to the properties or to the operation of said Palmer Company, and could not have been profitably or conveniently handled in connection with the handling of said Palmer Company properties. That said Ventura properties, even if they had not been worthless for purposes of production as aforesaid, lay at a great distance from the properties of said Palmer Company, and could not have been operated in any manner in relation to the operation of the wells, storage or distribution of said Palmer Company properties. That said Midway

properties were also at great distance from said Palmer Company properties and in an opposite direction to said Ventura properties, and could not have been operated in connection with or relation to the operation of the well, storage or distribution of said Palmer Company properties. That said Palmer Senior lands were wholly worthless and useless to said Palmer Company properties, in that they were lands not known to contain oil and which probably do not contain oil, and which if they did contain oil would be inconvenient and difficult to operate in connection with the operation of said Palmer Company's properties, and were wholly useless and worthless as an adjunct thereto. That the lands of said Palmer Junior Oil Company were, except a narrow strip of the westerly edge thereof, which might possibly contain oil, all wholly worthless and useless to said Palmer Company properties, as the same does not, so far as is known, contain oil, and are suited only for grazing purposes. That the said Union Company, at the time of said transfer of said Palmer properties, was unproductive of income from any source save from the sale of its capital stock, which capital stock at such [15] time had become unsalable for lack of market. That at the time of said transfer five wells in all had been started, on the various properties of said Union Company, and had been more or less bored, aside from said four shallow wells on said Ventura properties, and none of these save one were productive, and said producing well yielded not to exceed one hundred barrels of oil per day, and said Union Company had nearly ceased operations. That said transfer of said

Palmer Company was of great benefit to the stockholders of said Union Company but was destructive of the interests of the stockholders of said Palmer Company as hereinafter set forth.

VIII.

That thereafter said two millions of dollars of bonds and said two millions of dollars of stock of said Union Company were transferred by said directors of said Union Company to themselves as directors of said Palmer Company, and the said stocks and bonds were so held until on or about the 14th day of December, 1912. On said last mentioned date said Union Company directors caused to be assembled a meeting of the stockholders of said Union Company, at which meeting the capitalization of said Union Company was increased from six million (6,000,000) dollars, to ten million (10,000,000) dollars, said directors of said Palmer Company in behalf of said Palmer Company, voting thereat in favor of said increase two million shares of the capital stock of said Union Company pretended to be held by said Palmer Company, which vote of said Palmer Company was necessary to carry the proposal. Thereafter on the 17th day of December, 1912, said Union Company directors caused to be assembled another meeting of stockholders of said Union Company at which there was voted amended articles of incorporation, which said amended articles changed the character of the capital stock of said Union Company by making four million [16] dollars (4,000,000) thereof preferred shares, and the remaining six million dollars common shares, and

there voted at this meeting the following pretended stockholders with the pretended number of shares set opposite their respective names, the issued and outstanding capital stock of said Union Company at such time aggregating five million nine hundred thirty-seven thousand eight hundred fifty-four (5,937,854) shares, the voting of said pretended 2,000,000 shares of said Palmer Company being necessary to carry said proposition, and the voting of the same was without authority and unlawful:

Frank I. Guilford.....	625	Shares.
E. M. Price.....	937	“
Brown, Walker Simmons Company, a corporation.....	654671	“
Lewis A. Hilborn.....	106251	“
Frank L. Brown.....	21120	“
J. C. Kemp Van Ee.....	678825	“
Palmer Oil Company, a corporation	2000000	“
Palmer Junior Oil Company, a cor- poration.....	550015	“
H. C. Stratton.....	50000	“

Total voted..... 4062444 Shares.

That subsequent to the said 21st day of October, 1911, the principal place of business of said Union Company was removed from San Francisco to Palmer Camp near Sisquoc, Santa Barbara County, and all books of account, and documents of said Palmer Company and said Union Company, save the stock books of said Union Company, were removed from San Francisco to said Palmer Camp, which said removal was made, your orator is in-

formed and alleges, for the purpose of preventing access to said books by stockholders of said Palmer Company who had accepted or were being asked to accept stock in said Union Company as herein set forth, and of rendering inconvenient and difficult the attendance by stockholders of said Palmer Company at meetings of said Union Company. That said amended articles of incorporation were thereupon filed in the offices of [17] the Clerk of the City and County of San Francisco and of the Secretary of the State of California and thereafter said defendants acting as directors of said Palmer Company offered unto said Union Company the said bonds in exchange, dollar for dollar, of said preferred stock of said Union Company, and said defendants as a majority of directors of said Union Company accepted said offer, and said bonds were thereupon by said Union Company attempted to be canceled. That said bonded indebtedness of said Union Company was wrongfully and fraudulently reduced; that said Union Company had no right to receive said bonds or to cancel the same while at the same time asserting that the transfer of said assets of said Palmer Company to said Union Company was *bona fide* and for a fair consideration; if said sale was notwithstanding valid, as claimed by said Union Company said bonds belonged to said Palmer Company, and cancellation of the same by said Union Company was a conversion and a fraud upon said Palmer Company. That said delivery of said bonds of said Union Company, under an agreement to exchange the same for preferred stock of said Union

Company, was a further fraud upon said Palmer Company, and a part and process of the scheme of said conspirators to contrive, by successive steps, to deprive said minority stockholders of all interest of any value whatever in said Palmer Company properties.

That said preferred stock was not transferred by said Union Company to said Palmer Company, but was retained by said Union Company which refused to deliver the same to said Palmer Company, and never has delivered to said Palmer Company any of said preferred or common stock. Said Union Company thereafter fraudulently caused requests to issue to the minority stockholders of said Palmer Company to deliver to said Union Company their respective shares of stock in said Palmer Company whereupon, in exchange for [18] each share of stock of said Palmer Company as delivered, said Union Company would deliver one share of preferred and one share of common stock of said Union Company. That said exchange of stock purported to be the delivery to the stockholders of said Palmer Company of the preferred and common stock of said Union Company which said Union Company directors asserted said Palmer Company stockholders were entitled to receive in consideration of said bonds and said assets belonging to said Palmer Company, but said Union Company refused to deliver the same to said Palmer Company, or to deliver the same to the stockholders of said Palmer Company, unless they would first deliver to said Union Company their stock in said Palmer Company.

IX.

That said Union Company falsely represented unto said Palmer Company stockholders that said Union Company had a right to receive said Palmer Company stock in exchange for such preferred and common stock, and that the Palmer Company stockholders had by said proceedings agreed to and were in law obliged to surrender to said Union Company their shares in said Palmer Company and receive in exchange therefor the stock of said Union Company, and many Palmer Company stockholders, believing that said false representations were true, and not knowing or understanding the manner by which said transfer of said bonds for said preferred stock had been made, as herein set forth, but believing the representations made to them by said Union Company, and not knowing the facts herein set forth concerning the transfer of the assets and property of said Palmer Company to said Union Company, but believing said representations that said transfer was legal and proper, and that it had been made in good faith and for the benefit of all of the stockholders including the minority stockholders of said Palmer Company, many of said Palmer stockholders [19] being actuated by such consideration and by none other, with otherwise no intention of delivering up their said Palmer stock in exchange for said Union Company stock, did exchange their respective shares of said Palmer Company stock for said preferred and common shares. That said directors of Union Company by this means procured large quantities of said Palmer Company stock, sufficient in amount

when added to their own Palmer Company stock, to constitute two-thirds of said issued Palmer Company stock. Whereupon said directors of said Union Company and said directors of said Palmer Company, on March 22d, 1913, surreptitiously caused a meeting of the directors of said Palmer Company to be held, of which meeting the minority stockholders of said Palmer Company had no knowledge, and of which your orator had no knowledge, at which meeting there were present of the directors of said Palmer Company said Brown, Hilborn and Kemp Van Ee, whereupon a resolution was offered and unanimously passed by said three directors amending the Articles of Incorporation of said Palmer Company, which Amended Articles were filed with the County Clerk of the County of Los Angeles, and with the Secretary of State of California, wherein and whereby the period of existence of said Palmer Company was reduced from fifty (50) years, the period contained in the original Articles of Incorporation, to six (6) years, six (6) months and four (4) days, whereby it was sought to have said Palmer Company expire by limitation within six (6) days after the passage of said resolution, and within two (2) days after the date of the filing of said amended articles with said Secretary of State; that the only alleged stockholder of said Palmer Company consenting to the said amendment of said articles of incorporation was the said Union Company and that in such assent signed by said Union Company the said Union Company represented itself to be the owner and [20] holder of and consenting for 1,341,106 shares of the stock

of said Palmer Company, whereas said stock so pretended to assent thereto was not in fact, nor in law and equity, owned by the said Union Company, nor did the said Union Company have proxies from the owners thereof authorizing it to vote the same or to make said assent, but said shares of stock so assenting by said Union Company were, for the most part, fraudulently procured from the stockholders of said Palmer Company in the manner aforesaid.

X.

That thereafter said Union Company prepared a book in which it entered the names of all and several the minority stockholders of said Palmer Company, together with the number of Palmer Company shares respectively held by them, and placed opposite such names and shares such numbers of shares of said preferred and common stock as said Union Company desired said Palmer Company stockholders should receive in exchange for their said Palmer Company stock, and having so done, said Palmer Company directors in January, 1913, said Palmer Company being then a living and going corporation, and no hint or suggestion being made that said directors intended or contemplated putting it out of existence, notified all and several the stockholders of said Palmer Company to deliver unto one Moody, Secretary of said Palmer Company, their respective shares of said Palmer Company stock and receive therefor such shares of said preferred and common stock as had been set aside for them respectively as aforesaid, said deliveries of said Palmer Company stock to said Moody being in fact for the benefit of said

Union Company, to whom said Moody, your orator upon information and belief alleges, delivered the shares of Palmer Company stock so obtained.

XI.

That large numbers of said Palmer Company stockholders [21] failed and refused to so deliver up their said Palmer Company stock to said Moody, as aforesaid, whereupon said Union Company, for the purpose of forcing said deliveries of stock to said Moody, on or about August 26th, 1913, caused to be levied upon all of said Union Company stock an assessment of one cent per share, payable immediately said levy was made, and which became delinquent on the 25th day of September, 1913, in default of which payment, said stock was to be sold on the 14th day of October, 1913, and thereupon, on August 19th, 1913, said Union Company notified said minority Palmer stockholders that if they did not deliver their respective shares of Palmer stock to said Union Company, and receive said Union preferred and common stock respectively allotted to them, and pay said assessment levied upon said preferred and common stock, that said stock would on said 14th day of October, 1913, be sold, whereby such sale it was intended the holders of said Palmer Company stock would be divested of all property whatsoever in the assets of said Palmer Company. That there existed no reason whatever for the levying of said assessment upon said Union Company stock by said Union Company directors, save and except for the purpose of pretending to call to said Union Company said preferred and common shares out of the hands of said

Palmer Company stockholders, thereby pretending to divest said Palmer stockholders of their property as aforesaid, but the same was done for the purpose of frightening and so inducing the minority stockholders of said Palmer Company to make said exchange of securities, and your orator prays discovery as to what shares so purporting to belong to stockholders of the Palmer Company who had not assented to such exchange, were sold at said sale and the names of the respective purchasers thereof. [22]

XII.

That the only productive wells now operated by said Union Company, save and except said Wells in said Midway district, are five wells located upon said Palmer Company property; that the said wells, your orator is informed and believes and alleges now yield, and for a long time past have yielded, to said Union Company nine thousand dollars per month, which said sum is ample to pay all operating and other expenses of said Union Company property and to proceed with the drilling of whatever additional wells might reasonably be required, besides paying all proper debts and obligations owed by said Union Company, so that no assessment upon the stock of said Union Company for any legitimate purpose was necessary. That said Union Company stock is of nominal value, the common stock thereof now selling on the public oil exchange market at San Francisco at one cent per share assessment paid, said preferred shares bearing no quotation at all, and are not worth, as your orator believes and alleges, to exceed two and one-half cents per share. That it was not rea-

sonable to be expected that an assessment of one cent per share levied upon said preferred and common stock would be paid by the stockholders of said Union Company. That on October 2d, 1913, the holders of 1,269,184 shares of preferred stock, and of 2,633,687 shares of common stock of said Union Company actually did become delinquent in payment of said assessment, and their respective shares of stock were by said Union Company advertised to be sold at public auction on said 14th day of October, 1913, and large quantities of such stock, the precise number of shares whereof is to your orator unknown, were actually on said 14th day of October, 1913, sold or pretended to be sold, and were, as your orator is informed and believes and so charges the fact to be, purchased by said Union Company, or by said schemers, or by one or more of them, or [23] by persons acting in behalf of said schemers or of one or more of them or of said Union Company. That among the shares of stock so sold your orator is informed and believes, and so charges the fact to be, were those shares pretended by said Union Company to belong to your orator, which shares had been set aside as aforesaid by said Union Company to your orator as a holder and owner of stock in said Palmer Company as aforesaid.

XIII.

Your orator further shows, that after the attempted cancellation by said Union Company of said two million dollars of bonds as aforesaid, said Union Company caused to remain upon the property covered by said bonds which included all of the property

of said Palmer Company so pretended to be transferred to said Union Company, a bonded indebtedness of one million dollars. Your orator is informed and believes and alleges that said Union Company sold five hundred thousand dollars of said bonds, and the money derived therefrom, the amount of which is unknown to your orator, said directors recklessly and wantonly spent partially upon said property and partially for purposes unknown to your orator. That two hundred and fifty thousand dollars of said bonds, your orator is informed and believes and so charges the fact to be, were deposited with defendant Anglo-California Trust Company, as security for the payment of two hundred and Fifty Thousand Dollars, the purchase price agreed to be paid by said Union Company for said lands theretofore held by said Palmer Senior Oil Company under option of purchase as aforesaid, and sundry sums of money, the amounts of which is to your orator unknown, have been by said Union Company paid to said Anglo-California Trust Company on account of the purchase of said lands, and your orator prays discovery of the amount of said bonds sold or parted with by said Union Company and to whom delivered, and the purposes [24] for which delivered and the respective amounts thereof.

XIV.

Your orator further shows upon his information and belief that the said directors of said Union Company have operated and now are operating said Palmer Company properties in an extravagant and reckless manner, calculated to wreck said property

through creating heavy indebtedness thereupon; that your orator is informed and believes and alleges that said Union Company is now heavily in debt, without any justification for such indebtedness; that the income of said yielding wells upon said property, at all times, has been ample to defray all costs of operating said property and making reasonable extensions of wells thereupon. Your orator is advised, believes and alleges that as a result of said fraudulent transfer of the assets of said Palmer Company to said Union Company, said Palmer Company properties may be or become liable for a proportion of the indebtedness so created by said Union Company, which said pretended indebtedness may cause great loss to the stockholders of said Palmer Company. And your orator prays discovery of all the debts, bonded or otherwise, which are, or may become by operation of law, a charge upon any of the property of said Palmer Company so transferred to said Union Company, with the respective amounts, dates of creation and maturity thereof and names of parties to whom the same is owing. Your orator shows that said defendants, either in their capacities as directors of said Palmer Company or of said Union Company, have sunk upon said Palmer Company properties and upon said Union Company properties, eight wells (the total number of wells upon said property being fifteen), none of which said eight wells have produced oil but are out of commission and have at all times been out of [25] commission; that all of such wells have been sunk in an inefficient and unworkmanlike manner and are at

present a loss to said Palmer Company and said Union Company. That said wells are all of great depth, running from 2,500 to 3,200 feet and entailed great cost in their sinking. That two flowing wells on said Palmer Company property were by said schemers shut down for long period and permitted to sand up, and when reopened the sand was not removed from said wells so that the flowing of such wells would be resumed, but said wells were put on pumps, so that, instead of five thousand barrels of oil per day being derived from each of such flowing wells, three hundred barrels of oil per day become the output of each of such wells. Your orator is informed and believes and alleges that said reckless and wasteful manner of handling and operating said property was intentionally and designedly done for the purpose of impairing the values of said property, and reducing the value of the shares of the stock of said Union Company on the market, and ultimately of providing an excuse for said Union Company levying assessments upon the capital stock of said Union Company, with the intention on part of the said schemers in control of said Union Company, by levying assessments upon the capital stock of said Union Company under conditions in which such assessments would be paid by none of the stockholders of said Union Company except themselves, to cause large quantities of stock of said Union Company to be sold for delinquent assessments at which sales it might be brought in by said Union Company, thereby greatly increasing the value of the stocks owned by said schemers

in said Union Company, and whereby most of the other stockholders of said Union Company would be eliminated, but payments of their own assessments would be made out of large salaries and charges due to or made by them severally [26] from or against said Union Company; thereafter, said schemers, so remaining in control of said Union Company property and of said Palmer Company property, designing and intending to repair said out-of-commission wells, and said flowing wells which are now pumping, so that large quantities of oil will be then produced therefrom, which large production of oil would cause a great rise in the market value and the immediate salability of said Union Company stock, nearly all of which, it is the intention of said schemers, your orator believes and so alleges, shall at such time be owned by themselves.

XV.

That your orator was and has been and now is the owner and holder of said one thousand shares of the capital stock of said Palmer Company at all times herein mentioned since prior to said 21st day of October, 1911; and your orator did not consent to the transfer of said assets of said Palmer Company to said Union Company, and did not at any time consent to, and had no knowledge of the transfer by said defendant directors of said Union Company bonds belonging to said Palmer Company to said Union Company in exchange for the preferred shares of said Union Company, and did not deliver up his said Palmer Company stock to said Union Company in exchange for said preferred and common stock

of said Union Company. That this suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance, and no demand has been made by your orator upon the directors or upon the stockholders of said Palmer Company to do and perform the things herein prayed on behalf of said Palmer Company to be performed, or to bring suit in court therefor, for the reason that the said Board of Directors of said Palmer Company are the persons, or are in control of the [27] persons, who have committed the frauds herein alleged, and that said directors also control $\frac{2}{3}$ ds of the issued and outstanding capital stock of said Palmer Company, and for your orator to call them or any of them to do the things aforesaid would be futile and vain; and for the further reason that said directors of said Palmer Company have attempted and sought to extinguish said Palmer Oil Company by causing to be filed with the County Clerk and Secretary of State as aforesaid said amended Articles of Incorporation whereby, if the said amendment was legal and effective, said Palmer Company has expired and no longer exists, and said directors now claim and maintain that said Palmer Company does not either in fact, or in law, now exist, and that they are no longer directors or officers thereof.

XVI.

That the amount in controversy herein exceeds, exclusive of interest and costs, the sum of \$3,000.00, and there exists to your orator no plain, adequate and complete remedy at law.

XVII.

That all and several the frauds herein mentioned as having been committed by the said defendants, directors as aforesaid, or either of them, of the said Palmer Oil Company and of the said Union Company were not discovered or made known to your orator before six months from this date. Your orator resides in the State of Ohio, and had no personal knowledge of the facts herein set forth at the time they occurred or soon thereafter. That the defendants above named, from time to time, made representations to your orator concerning said matters and things which were false and untrue, and none of said representations made to your orator by said defendants contained any of the facts above set forth, which constitute and show the said frauds upon said Palmer Company and the minority stockholders thereof, and your [28] orator trusted and believed the said representations of said defendants, and relied thereon, and did not discover any of the facts above set forth concerning the frauds above described, before the time above mentioned, when he began to make investigations upon his own account and discovered for the first time said facts above set forth.

WHEREFORE YOUR ORATOR PRAYS:

1. That the transfer by which the assets of said Palmer Company were conveyed to said Union Company be declared null and void and of no effect, and that a decree be entered herein directing the said Union Company to reconvey said assets to said Palmer Company, or to a receiver, if such receiver be

appointed as hereinafter prayed.

2. That an accounting be had between said Palmer Company and said Union Company and that there be determined the amount of indebtedness, if any, created by said Union Company, which shall be borne by said Palmer Company assets, and the amount, if any, which may be due by said Union Company to said Palmer Company, and that the several defendants make full and true discovery and disclosure of and concerning all the matters and things hereinbefore mentioned.

3. That upon a decree being entered setting aside and avoiding said transfer, and restoring to said Palmer Company its said assets, if said Palmer Company be found to be disincorporated, that a receiver be appointed to receive and manage such assets, instead of said trustees, and to distribute such assets to the stockholders of said Palmer Company.

4. That said Union Company be decreed to restore to all and several the stockholders of said Palmer Company who may join herein and who shall return to said Union Company its said preferred and common stock, their several shares of Palmer Company stock theretofore [29] by them delivered to said Union Company.

5. That the transaction whereby said Union Company acquired from said Palmer Senior Oil Company the said option to purchase of defendant Anglo-California Trust Company the lands covered by said option, in security for the purchase of which lands by said Union Company two hundred thousand dollars of bonds of said Union Company were by said

Union Company deposited with said Anglo-California Trust Company, be rescinded in so far as said bonds constitute any lien or claims upon the assets of said Palmer Company, and that all mortgages or other liens or claims upon the property of said Palmer Company, so transferred to said Union Company, executed, made or given by said Union Company, be declared null and void and of no effect.

6. That a decree be entered adjudging that the redelivery by said Palmer Company directors of said two million (2,000,000) dollars of Union Company bonds back to said Union Company was wrongful, and a fraud upon said Palmer Company; that said attempted cancellation by said Union Company of said bonds was noneffective; that said Union Company at all times held said bonds to the use of said Palmer Company, subject to avoidance by said Palmer Company of its minority stockholders acting in its behalf, of said transfer of said assets.

7. That a decree be entered adjudging that the said Frank L. Brown, Lewis A. Hilborn, J. C. Kemp Van Ee, H. C. Stratton and Charles E. Ladd, directors of said Palmer Oil Company at the time said assets of said Palmer Company were transferred to said Union Company and at the time said bonds were delivered to said Union Company, jointly and severally as individuals, pay unto the said Palmer Oil Company for the use and benefit of its said stockholders the sum of two million dollars.

8. That your orator be allowed for the payment of his solicitors herein, such reasonable fee as your Honors may determine, for [30] the services per-

formed and to be performed in and about the litigation herein, and that such allowance be declared a lien upon the property of said Palmer Company and of said Union Company, to be paid to such solicitors therefrom.

9. And such other and further relief as your Honors may at any time find meet and equitable.

May it please your Honors to grant unto your orator, a writ of subpoena of the United States of America directed to said Palmer Union Oil Company, Palmer Oil Company, Frank L. Brown, Lewis A. Hilborn, George L. Walker, Charles E. Ladd, Gavin McNab, H. C. Stratton and George I. Stewart, as directors of said Palmer Union Oil Company and in their respective individual capacities; Frank L. Brown, J. C. Kemp Van Ee, Lewis A. Hilborn, H. C. Stratton and Charles E. Ladd, as directors of Palmer Oil Company, and in their respective individual capacities; and Anglo-California Trust Company, a corporation, commanding them on a day certain to appear and answer unto this bill of complaint and to abide and perform such order and decree in the premises as to the Court shall seem proper and required by the principles of equity and good conscience.

JOHN E. BENNETT,
JESSE OLNEY,

Solicitors and Counsel for Complainant. [31]

United States of America,
State of California,
City and County of San Francisco,—ss.

Jesse Olney, being duly sworn, deposes and says:

I am one of the attorneys of the complainant in the foregoing amended bill of complaint.

I have read the said amended bill of complaint and know the contents thereof, and that the same is true of my own knowledge except as to those matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

The reason this verification is not made by the complainant is that he is not within the State of California or the City and County of San Francisco nor the Northern District of California, in which said city and county and said Northern District my office is located.

JESSE OLNEY.

Subscribed and sworn to before me this fifteen day of November, 1913.

[Seal] W. B. MALING,
Clerk U. S. District Court, Northern District of
California.

[Endorsed]: Filed Nov. 15, 1913. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [32]

Subpoena Ad Respondendum.

UNITED STATES OF AMERICA.

District Court of the United States, Northern District of California, Second Division.

IN EQUITY.

The President of the United States of America,
Greeting: to Palmer Oil Company, a Corporation.

YOU ARE HEREBY COMMANDED, That you be and appear in said District Court of the United States, Second Division, aforesaid, at the courtroom in San Francisco, twenty days from the date hereof, to answer an Amended Bill of Complaint exhibited against you in said Court by ANDREW CLAUSS, who is a citizen of the State of Ohio, and to do and receive what the said Court shall have considered in that behalf.

Witness, the Honorable WILLIAM C. VAN FLEET, Judge of said District Court, this 15th day of November; in the year of our Lord one thousand nine hundred and thirteen and of our Independence the 138th.

[Seal]

WALTER B. MALING,
Clerk.

By J. A. Schaertzer,
Deputy Clerk.

MEMORANDUM PURSUANT TO RULE 12,
RULES OF PRACTICE FOR THE COURTS
OF EQUITY OF THE UNITED STATES.

YOU ARE HEREBY REQUIRED to file your answer or other defense in the above suit, on or before the twentieth day after service, excluding the day thereof, of this subpoena, at the Clerk's Office of said Court, pursuant to said bill: otherwise the said bill may be taken *pro confesso*.

WALTER B. MALING,
Clerk.

By J. A. Schaertzer,
Deputy Clerk. [33]

Return on Service of Writ.

United States of America,
Northern District of California,—ss.

I hereby certify and return that I served the annexed Subpoena Ad Respondendum on the therein named Palmer Oil Company, a corporation, by handing to and leaving an attested copy thereof with Robt. R. Moody, Secretary of the Palmer Oil Company, a corporation, personally, at San Francisco, in said District, on the 4th day of December, A. D. 1913.

C. T. ELLIOTT,
U. S. Marshal.

By Paul J. Arnerich,
Deputy.

I further return that the said Robt. R. Moody denied that he was the Secretary of the Palmer Oil Co., a Corp.

The undersigned further says that supplementary

to the said service he asked the said Moody the following questions:

1. Is the Palmer Oil Company now in existence as a corporation? To which said Moody replied: No.

2. If the Palmer Oil Company be not now in existence, when did it go out of existence? To which said Moody replied as follows: March 28th, 1913.

3. If said Palmer Oil Company is out of existence, who was the secretary of said company at the time it went out of existence? To which said Moody replied as follows: He was secretary for some three months prior to the Palmer Oil Co. going out of existence and that he did not know who was secretary on the date that it went out of existence.

C. T. ELLIOTT,

U. S. Marshal.

By Paul J. Arnerich,

Office Deputy. [34]

[Endorsed]: Filed December 5, 1913. W. B. Mal-
ing, Clerk. By J. A. Schaertzer, Deputy Clerk.
[35]

*In the District Court of the United States, in and
for the Northern District of California, Second
Division.*

IN EQUITY.

ANDREW CLAUSS,

Plaintiff,

vs.

PALMER UNION OIL COMPANY, a Corpora-
tion, et al.,

Defendants.

**Motion of Palmer Union Oil Company to Dismiss
Amended Bill of Complaint.**

To the Honorable, the Judges of the United States
District Court in and for the Northern District
of California, Second Division:

Palmer Union Oil Company, one of the above-
named corporation defendants, through its solicitors
herein, hereby moves to dismiss the amended bill of
complaint herein as against it, upon the following
and each of the following grounds, to wit:

I.

That the Court has no jurisdiction of the subject
matter of the action, for the following, and each of
the following, reasons:

(a) As the matter under controversy does not ex-
ceed, exclusive of interest and costs, the sum or value
of Three Thousand (3,000) Dollars;

(b) As the suit is one of a local nature, to recover
and place in the hands of a receiver real property
and personal property situated in the Southern Dis-

trict of the State of California, of which the defendant corporation is an inhabitant and a citizen.

II.

That there is a nonjoinder of parties defendant, in [36] this: that Palmer Senior Oil Company is a necessary party, and has not been joined.

III.

That there is a nonjoinder of parties defendant, in this: that the creditors of Palmer Oil Company are necessary parties, and have not been joined.

IV.

That the said bill of complaint fails to comply with Equity Rule No. 25, in this: that it does not contain the usual caption showing the parties plaintiff and defendant.

V.

That the bill fails to comply with Equity Rule No. 25, second subdivision, in that it does not contain a short and plain, or any statement of the grounds upon which the Court's jurisdiction depends.

VI.

That the said bill herein fails to comply with Equity Rule No. 25, subdivision third, in this: that it does not contain a short and simple statement of the ultimate facts upon which the plaintiff asks relief, omitting mere statements of evidence.

VII.

That the said bill fails to comply with Equity Rule No. 25, subdivision fourth, in this: that it does not state why the creditors of defendant Palmer Oil Company are not made parties.

VIII.

That there is a misjoinder of causes of action herein, to wit: the joinder of a stockholder's bill to set aside a sale of the assets of Palmer Oil Company and recover same, with an action against the directors of said company for the value of said assets.

IX.

That there is a misjoinder of causes of action herein, [37] to wit: the joinder of a stockholder's bill to set aside the sale and transfer of the assets of said corporation made in exchange for stock and bonds, with a cause of action affirming such sale and transfer, and seeking recovery of the consideration therefor.

X.

That there is a misjoinder of causes of action herein, to wit: the joinder of a cause of action to avoid the cancellation of the bonds above referred to, with a cause of action against the directors of Palmer Oil Company for selling said bonds to Palmer Union Oil Company.

XI.

That the facts set forth in said bill are insufficient to constitute a valid cause of action in equity.

XII.

That said bill is multifarious.

XIII.

That said bill fails to comply with Equity Rule No. 38, in that it fails to show that the question involved is one of common or general interest to many persons, and that said persons constitute a class so numerous as to make it impracticable to bring them

all before the Court.

XIV.

That the said bill fails to comply with Equity Rule No. 27, in that it does not allege that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share has devolved on him since by operation of law.

Respectfully submitted,

GAVIN McNAB,

R. P. HENSHALL, [38]

N. SCHMULOWITZ,

ROBT. R. MOODY,

B. M. AIKINS,

Solicitors for said Defendant.

[Endorsed]: Filed Nov. 25, 1913. W. B. Maling,
Clerk. [39]

*In the District Court of the United States, in and
for the Northern District of California, Second
Division.*

IN EQUITY.

ANDREW CLAUSS,

Plaintiff,

vs.

PALMER UNION OIL COMPANY, a Corpora-
tion, et al.,

Defendants.

**Motion of George I. Stewart and Gavin McNab to
Dismiss Amended Bill of Complaint.**

To the Honorable, the Judges of the United States
District Court in and for the Northern District
of California, Second Division:

George I. Stewart and Gavin McNab, defendants
above named, sued herein as directors of Palmer
Union Oil Company, and in their individual capacities,
through their solicitors herein, hereby move to
dismiss the amended bill of complaint herein as
against them (1) in their individual capacities, and
(2) as directors of Palmer Union Oil Company, upon
the following and each of the following grounds, to
wit:

I.

That as individual defendants they are improperly
joined as defendants herein.

II.

That the facts set forth in said bill are insufficient
to constitute a valid cause of action in equity as
against them in their individual capacities.

III.

That as directors of Palmer Union Oil Company
they are improperly joined as parties defendant.
[40]

IV.

That the Court has no jurisdiction of the subject
matter of the action, for the following, and each of
the following reasons:

(a) As the matter under controversy does not
exceed, exclusive of interest and costs, the sum or

value of Three Thousand (3,000) Dollars;

(b) As the suit is one of a local nature, to recover and place in the hands of a receiver real property and personal property situated in the Southern District of the State of California, of which the defendant corporation is an inhabitant and a citizen.

V.

That there is a nonjoinder of parties defendant, in this: that Palmer Senior Oil Company is a necessary party, and has not been joined.

VI.

That there is a nonjoinder of parties defendant, in this: that the creditors of Palmer Oil Company are necessary parties, and have not been joined.

VII.

That the said bill of complaint fails to comply with Equity Rule No. 25, in this: that it does not contain the usual caption showing the parties plaintiff and defendant.

VIII.

That the bill fails to comply with Equity Rule No. 25, a second subdivision, in that it does not contain a short and plain, or any statement of the grounds upon which the Court's jurisdiction depends.

IX.

That the said bill herein fails to comply with Equity Rule No. 25, subdivision third, in this: that it does not contain a [41] short and simple statement of the ultimate facts upon which the plaintiff asks relief, omitting mere statements of evidence.

X.

That the said bill fails to comply with Equity Rule

No. 25, subdivision fourth, in this: that it does not state why the creditors of defendant Palmer Oil Company are not made parties.

XI.

That there is a misjoinder of causes of action herein, to wit: the joinder of a stockholder's bill to set aside a sale of the assets of Palmer Oil Company and recover same, with an action against the directors of said Company for the value of said assets.

XII.

That there is a misjoinder of causes of action herein, to wit: the joinder of a stockholder's bill to set aside the sale and transfer of the assets of said corporation made in exchange for stock and bonds, with a cause of action affirming such sale and transfer, and seeking recovery of the consideration therefor.

XIII.

That there is a misjoinder of causes of action herein, to wit: the joinder of a cause of action to avoid the cancellation of the bonds above referred to, with a cause of action against the directors of Palmer Oil Company for selling said bonds to Palmer Union Oil Company.

XIV.

That there is a misjoinder of causes of action herein, to wit: the joinder of a suit in equity for the return of assets traced into the possession of Palmer Union Oil Company, with an action at law for the value of the assets against the directors of Palmer Oil Company.

XV.

That the facts set forth in said bill are insufficient
[42] to constitute a valid cause of action in equity.

XVI.

That said bill is multifarious.

XVII.

That said bill fails to comply with Equity Rule No. 38, in that it fails to show that the question involved is one of common or general interest to many persons, and that said persons constitute a class so numerous as to make it impracticable to bring them all before the Court.

XVIII.

That the said bill fails to comply with Equity Rule No. 27, in that it does not allege that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share has devolved on him since by operation of law.

Respectfully submitted,

LUTHER ELKINS,

Solicitors for the Above-named Defendants.

[Endorsed]: Filed Nov. 25, 1913. W. B. Maling,
Clerk. [43]

*In the District Court of the United States, in and
for the Northern District of California, Second
Division.*

IN EQUITY.

ANDREW CLAUSS,

Plaintiff,

vs.

PALMER UNION OIL COMPANY, a Corpora-
tion, et al.,

Defendants.

**Motion of Anglo-California Trust Company to Dis-
miss Amended Bill of Complaint.**

To the Honorable, the Judges of the United States
District Court in and for the Northern District
of California, Second Division:

Anglo-California Trust Company, one of the above-
named corporation defendants, through its solicitor
herein, hereby moves to dismiss the amended bill of
complaint herein as against it, upon the following
and each of the following grounds, to wit:

I.

That the facts set forth in said bill are insufficient
to constitute a valid cause of action in equity as
against it.

Respectfully submitted,

GAVIN McNAB,

Solicitor for the Above-named Defendant Corpora-
tion.

[Endorsed]: Filed Nov. 25, 1913. W. B. Maling,
Clerk. [44]

*In the District Court of the United States, in and
for the Northern District of California, Second
Division.*

IN EQUITY.

ANDREW CLAUSS,

Plaintiff,

vs.

PALMER UNION OIL COMPANY, a Corpora-
tion, et al.,

Defendants.

**Motion of Frank L. Brown, Lewis A. Hilborn, George
L. Walker, Charles E. Ladd and H. C. Stratton
to Dismiss Amended Bill of Complaint.**

To the Honorable, the Judges of the United States
District Court in and for the Northern District
of California, Second Division:

Frank L. Brown, Lewis A. Hilborn, George L.
Walker, Charles E. Ladd and H. C. Stratton, defend-
ants above named, sued herein as directors of Palmer
Union Oil Company, and in their individual capa-
cities, and as directors or trustees of Palmer Oil
Company, through their solicitors herein, hereby
move to dismiss the amended bill of complaint herein
as against them (1) in their individual capacities,
(2) as directors of Palmer Union Oil Company, and
(3) directors or trustees of Palmer Oil Company,
upon the following grounds, and each thereof, to wit:

I.

That as individual defendants they are improperly
joined as defendants herein.

II.

That as directors of Palmer Union Oil Company they are improperly joined as defendants herein.

III.

That they are improperly joined as parties defendant "as directors of said Palmer Oil Company" "or trustees thereof, if said corporation be defunct," for the reason that it cannot be [45] determined in which of said capacities they are being sued.

IV.

That the Court has no jurisdiction of the subject matter of the action, for the following, and each of the following reasons:

(a) As the matter under controversy does not exceed, exclusive of interest and costs, the sum or value of Three Thousand (3,000) Dollars;

(b) As the suit is one of a local nature, to recover and place in the hands of a receiver real property and personal property situated in the Southern District of the State of California, of which the defendant corporation is an inhabitant and a citizen.

V.

That there is a nonjoinder of parties defendant, in this: that Palmer Senior Oil Company is a necessary party, and has not been joined.

VI.

That there is a nonjoinder of parties defendant, in this: that the creditors of Palmer Oil Company are necessary parties, and have not been joined.

VII.

That the said bill of complaint fails to comply with Equity Rule No. 25, in this: that it does not contain

the usual caption showing the parties plaintiff and defendant.

VIII.

That the bill fails to comply with Equity Rule No. 25, second subdivision, in that it does not contain a short and plain, or any statement of the grounds upon which the Court's jurisdiction depends.

IX.

That the said bill herein fails to comply with Equity Rule [46] No. 25, subdivision third, in this: that it does not contain a short and simple statement of the ultimate facts upon which the plaintiff asks relief, omitting mere statements of evidence.

X.

That the said bill fails to comply with Equity Rule No. 25, subdivision fourth, in this: that it does not state why the creditors of defendant Palmer Oil Company are not made parties.

XI.

That there is a misjoinder of causes of action herein, to wit: the joinder of a stockholder's bill to set aside a sale of the assets of Palmer Oil Company and recover same, with an action against the directors of said company for the value of said assets.

XII.

That there is a misjoinder of causes of action herein, to wit: the joinder of a stockholder's bill to set aside the sale and transfer of the assets of said corporation made in exchange for stock and bonds, with a cause of action affirming such sale and transfer, and seeking recovery of the consideration therefor.

XIII.

That there is a misjoinder of causes of action herein, to wit: the joinder of a cause of action to avoid the cancellation of the bonds above referred to with a cause of action against the directors of Palmer Oil Company for selling said bonds to Palmer Union Oil Company.

XIV.

That there is a misjoinder of causes of action herein, to wit: the joinder of a suit in equity for the return of assets traced into the possession of Palmer Union Oil Company, with an action at law for the value of the assets against the directors of Palmer Oil Company. [47]

XV.

That there is a misjoinder of causes of action herein, to wit: the joinder of a suit in equity for the return to Palmer Oil Company of assets traced into the possession of Palmer Union Oil Company, with a suit for the delivery to the stockholders of Palmer Oil Company of said assets.

XVI.

That the facts set forth in said bill are insufficient to constitute a valid cause of action in equity.

XVII.

That the said bill is multifarious.

XVIII.

That said bill fails to comply with Equity Rule No. 38, in that it fails to show that the question involved is one of common or general interest to many persons, and that said persons constitute a class so numerous as to make it impracticable to bring them

all before the Court.

XIX.

That the said bill fails to comply with Equity Rule No. 27, in that it does not allege that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share has devolved on him since by operation of law.

Respectfully submitted,

GAVIN McNAB,
R. P. HENSHALL,
N. SCHMULOWITZ,
ROBT. R. MOODY,
B. M. AIKINS,

Solicitors for the Above-named Defendants

[Endorsed]: Filed Nov. 25, 1913. W. B. Maling,
Clerk. [48]

*In the District Court of the United States, in and
for the Northern District of California, Second
Division.*

IN EQUITY.

ANDREW CLAUSS,

Plaintiff,

vs.

PALMER UNION OIL COMPANY, a Corpora-
tion, et al.,

Defendants.

**Motion of J. C. Kemp Van Ee to Dismiss Amended
Bill of Complaint.**

To the Honorable Judges of the United States District Court, in and for the Northern District of California, Second Division:

J. C. Kemp Van Ee, sued herein or attempted to be sued herein as a director of Palmer Oil Company, or alternatively as a trustee thereof, and in his individual capacity, hereby moves to dismiss the amended bill of complaint herein, upon the following grounds, and each thereof, to wit:

I.

That the facts set forth in said bill are insufficient to constitute a valid cause of action in equity as to him.

II.

That the bill is multifarious.

III.

That it cannot be determined from the bill whether he is sued as a director of Palmer Oil Company, an existing corporation, or as trustee for the stockholders of Palmer Oil Company, a defunct corporation.

IV.

That there is a nonjoinder of parties defendant, in this: That the creditors of Palmer Oil Company are necessary parties [49] and have not been joined.

V.

Upon each of the grounds set forth in the motion

of Frank L. Brown and others, already filed herein.

Respectfully submitted,

GAVIN McNAB,
R. P. HENSHALL,
ROBT. R. MOODY,
B. M. AIKINS,
N. SCHMULOWITZ,

Solicitors for the Above-named Defendants.

Receipt of a copy of the within is acknowledged
this 30th day of December 1913.

JESSE OLNEY &
JOHN E. BENNETT,
Attorneys for Plaintiff.

[Endorsed]: Filed Dec. 30, 1913. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [50]

*In the District Court of the United States, in and
for the Northern District of California, Second
Division.*

No. 45.

ANDREW CLAUSS,

Plaintiff,

vs.

PALMER UNION OIL COMPANY, a Corpora-
tion, et al.,

Defendants.

Order Pro Confesso.

In this cause the defendants Palmer Union Oil
Company, a corporation, Frank L. Brown, Lewis A.
Hilborn, George L. Walker, Charles E. Ladd, Gavin

McNab, H. C. Stratton, and George I. Stewart, as directors of said Palmer Union Oil Company, and in their respective and individual capacities, Frank L. Brown, J. C. Kemp Van Ee, Lewis A. Hilborn, H. C. Stratton, and Charles E. Ladd, as directors of Palmer Union Oil Company, a corporation, and in their respective and individual capacities, Anglo-California Trust Company, a corporation, and Palmer Oil Company, a corporation, having been served with process and the amended bill of complaint, as appears from the record and papers on file herein, and having failed to answer to plaintiff's amended bill of complaint within the time allowed by the rules, and the time for answering the amended bill of complaint having expired;

Now, upon application of John E. Bennett and Jesse Olney, Esqs., attorneys for plaintiff, it is hereby ordered that the amended bill of complaint herein be and the same is hereby taken *pro confesso* against Palmer Union Oil Company, a corporation, Frank L. Brown, Lewis A. Hilborn, George L. Walker, Charles E. Ladd, Gavin McNab, H. C. Stratton, and George I. Stewart, as directors of said Palmer Union Oil Company, and in their respective and individual capacities, Frank L. Brown, J. C. Kemp Van Ee, [51] Lewis A. Hilborn, H. C. Stratton, and Charles E. Ladd, as directors of Palmer Oil Company, a corporation, and in their respective and individual capacities, Anglo-California Trust Company, a corpo-

ration, and Palmer Oil Company, a corporation.

Entered January 19, 1914.

WALTER B. MALING,

Clerk.

By J. A. Schaertzer,

Deputy Clerk. [52]

*In the District Court of the United States, in and
for the Northern District of California, Second
Division.*

IN EQUITY.

ANDREW CLAUSS,

Plaintiff,

vs.

PALMER UNION OIL COMPANY, a Corpora-
tion, et al.,

Defendants.

**Notice of Motion [of Defendant Palmer Union Oil
Co.] for an Order Vacating Decree Pro Con-
fesso.**

To the Plaintiff in the Above-entitled Action, and to
John E. Bennett, Esq., and Jesse Olney, Esq.,
His Attorneys:

YOU AND EACH OF YOU WILL PLEASE
TAKE NOTICE that the defendant Palmer Union
Oil Company in the above-entitled action will move
the above-entitled court, sitting in its courtroom, in
the Postoffice Building, in the City and County of
San Francisco, within the Northern District of Cali-
fornia, at the hour of four o'clock P. M., of the

26th day of January, 1914, for an order vacating, annulling, setting aside and rescinding that certain order or decree *pro confesso* made and entered by the Clerk of the above-entitled court on the 19th day of January, 1914, in so far as the defendant above named is concerned, and in and by which said order or decree *pro confesso* it was ordered that the amended bill of complaint herein be and the same was thereby or was attempted thereby to be taken *pro confesso* against Palmer Union Oil Company, a corporation, Frank L. Brown, Lewis A. Hilborn, George L. Walker, Charles E. Ladd, Gavin McNab, H. C. Stratton and George I. Stewart, as directors of said Palmer Union Oil Company, and in their respective and individual capacities, Frank L. Brown, J. C. Kemp Van Ee, Lewis A. Hilborn, H. C. Stratton and Charles E. Ladd, as directors of Palmer Oil [53] Company, a corporation, and in their respective and individual capacities, Anglo-California Trust Company, a corporation, and Palmer Oil Company, a corporation.

Said motion and application will be made and based upon the grounds following, to wit:

1. That said order or decree *pro confesso* so entered by the clerk as aforesaid, was and is void upon its face.
2. That at the time said order or decree *pro confesso* was attempted to be entered as aforesaid, said defendant was not in default.
3. That at the time said order or decree *pro confesso* was attempted to be entered, said defendant had duly served and filed, as required by the equity

rules, a motion to dismiss said amended bill of complaint, and that said motion to dismiss was then pending and had not been determined.

4. That the entry of an order or decree *pro confesso* for failure to answer an amended bill of complaint when the defendant thereto had served and filed a motion to dismiss said amended bill of complaint, as required by the equity rules, was and is void.

5. That said defendant was not or could not be in default for failing to answer said amended bill of complaint, as attempted to be recited in said order or decree *pro confesso*, when the records of the Court showed that said defendant had, within the time allowed by said equity rules, filed a motion to dismiss said amended bill of complaint, and that said motion to dismiss was then pending and undetermined.

6. That said defendant had, within the time allowed by said equity rules, presented a defense to said amended bill of complaint, and that said defense was, at the time said order or decree *pro confesso* was attempted to be entered, before the Court and undetermined,—all as required and as permitted by Equity [54] Rule No. 29.

Upon the hearing of said motion and application, reference will be made and had to all the papers and pleadings on file in this action, to said order or decree *pro confesso*, to the books kept by the Clerk of this Court, referred to in Equity Rule No. 3, to the affidavit of Gavin McNab and an order of Court, copies of which are herewith served upon you, and to

this notice of motion.

Dated: January 21, 1914.

GAVIN McNAB,
R. P. HENSHALL,
B. M. AIKINS,
R. R. MOODY,

Attorneys for Said Defendant.

Copy of the within Notice of Motion, Order of Court, and Affidavit of Gavin McNab is hereby admitted this —— day of January, 1914.

JESSE OLNEY,
JOHN E. BENNETT,
Attorneys for Plaintiffs.

[Endorsed]: Filed Jan. 21, 1914. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [55]

*In the District Court of the United States, in and
for the Northern District of California, Second
Division.*

IN EQUITY.

ANDREW CLAUSS,

Plaintiff,

vs.

PALMER UNION OIL COMPANY, a Corpora-
tion et al.,

Defendants.

Notice of Motion [of Defendants Frank L. Brown et al.] for an Order Vacating Decree Pro Confesso.

To the Plaintiff in the Above-entitled Action, and
to John E. Bennett, Esq., and Jesse Olney, Esq.,
His Attorney:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that the defendants in the above-entitled action, named as follows: Frank L. Brown, Lewis A. Hilborn, George L. Walker, Charles E. Ladd and H. C. Stratton, sued herein as directors of Palmer Union Oil Company, and in their individual capacities, and as directors or trustees of Palmer Oil Company, will move the above-entitled Court, sitting in its courtroom, in the Postoffice Building, in the City and County of San Francisco, within the Northern District of California, at the hour of four o'clock P. M., of the 26th day of January, 1914, for an order vacating, annulling, setting aside and rescinding that certain order or decree *pro confesso* made and entered by the Clerk of the above-entitled Court on the 19th day of January, 1914, in so far as the defendants above named are concerned, and in and by which said order or decree *pro confesso* it was ordered that the amended bill of complaint herein be and the same was thereby or was attempted thereby to be taken *pro confesso* against Palmer Union Oil Company, [56] a corporation, Frank L. Brown, Lewis A. Hilborn, George L. Walker, Charles E. Ladd, Gavin McNab, H. C. Stratton and George I. Stewart, as directors of said

Palmer Union Oil Company, and in their respective and individual capacities, Frank L. Brown, J. C. Kemp Van Ee, Lewis A. Hilborn, H. C. Stratton and Charles E. Ladd, as directors of Palmer Oil Company, a corporation, and in their respective and individual capacities, Anglo-California Trust Company, a corporation, and Palmer Oil Company, a corporation.

Said motion and application will be made and based upon the grounds following, to wit:

1. That said order or decree *pro confesso* so entered by the Clerk as aforesaid was and is void upon its face.

2. That at the time said order or decree *pro confesso* was attempted to be entered as aforesaid, none of said defendants was in default.

3. That at the time said order or decree *pro confesso* was attempted to be entered, each of said defendants had duly served and filed, as required by the equity rules, a motion to dismiss said amended bill of complaint, and that said motion to dismiss was then pending and had not been determined.

4. That the entry of an order or decree *pro confesso* for failure to answer an amended bill of complaint when the defendants thereto had served and filed a motion to dismiss said amended bill of complaint, as required by the equity rules, was and is void.

5. That none of said defendants was or could be in default for failing to answer said amended bill of complaint, as attempted to be recited in said order or decree *pro confesso*, when the records of the Court

showed that said defendants had, within the time allowed by said equity rules, filed a motion to dismiss said [57] amended bill of complaint, and that said motion to dismiss was then pending and undetermined.

6. That each of said defendants had, within the time allowed by said equity rules, presented a defense to said amended bill of complaint, and that said defense was, at the time said order or decree *pro confesso* was attempted to be entered, before the Court and undetermined,—all as required and as permitted by Equity Rule No. 29.

Upon the hearing of said motion and application, reference will be made and had to all the papers and pleadings on file in this action, to said order or decree *pro confesso*, to the books kept by the Clerk of this Court, referred to in Equity Rule No. 3, and to the affidavit of Gavin McNab and an order of Court, copies of which are herewith served upon you, and to this notice of motion.

Dated, January 21, 1914.

GAVIN McNAB,
R. P. HENSHALL,
R. R. MOODY,
B. M. AIKINS,

Attorneys for said Defendants.

Copy of the within notice of motion, order of Court, and affidavit of Gavin McNab is hereby admitted this — day of January, 1914.

JESSE OLNEY,
JOHN E. BENNETT,
Attorneys for Plaintiff.

[Endorsed]: Filed Jan. 21, 1914. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [58]

*In the District Court of the United States in and for
the Northern District of California, Second
Division.*

IN EQUITY.

ANDREW CLAUSS,

Plaintiff,

vs.

PALMER UNION OIL COMPANY, a Corpora-
tion, et al.,

Defendants.

Affidavit of Gavin McNab.

State of California,
City and County of San Francisco,
Northern District of California,—ss.

Gavin McNab, being first duly sworn, deposes and says: That he is one of the defendants named in the above-entitled action, and that he is also one of the attorneys for certain of the defendants in said action; that he is familiar with all the facts and matters alleged in the amended bill of complaint on file herein, and is also familiar with the defense on the merits to the alleged cause of action set forth in said amended bill of complaint on behalf of each and all of the defendants thereto; that he has fully and fairly stated all the facts of said case to the solicitors and counsel for the defendants herein, to wit, to R. R. Moody and to R. P. Henshall, and he has been

advised by said counsel and by each of them, and he verily believes, that he, as one of the defendants, and that each of the defendants, has a good defense on the merits to the action.

GAVIN McNAB.

Subscribed and sworn to before me this 21st day of January, 1914.

[Seal]

W. W. HEALEY,

Notary Public in and for the City and County of San Francisco, State of California. [59]

[Endorsed]: Filed Jan. 21, 1914. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [60]

At a stated term, to wit, the November term, A. D. 1913, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the courtroom, in the City and County of San Francisco, on Monday, the 26th day of January, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable MAURICE T. DOOLING, District Judge.

EQUITY—45.

ANDREW CLAUSS,

vs.

PALMER UNION OIL CO. et al.

[Order Granting Motions to Vacate Order Taking Amended Bill Pro Confesso; and Vacating Former Order, etc.]

Defendants' motions to vacate order taking

amended bill *pro confesso* came on regularly for hearing and being submitted after arguments and fully considered, it was ordered that said motions be and the same are hereby granted, and the order heretofore entered taking the amended bill *pro confesso* is hereby vacated and set aside as to each and all of the said defendants.

Ordered that defendants' motions to dismiss the amended bill be continued to Thursday, January 29, 1914, at 4 o'clock P. M. [61]

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 45—EQ.

ANDREW CLAUSS,

Plaintiff,

vs.

PALMER UNION OIL COMPANY, a Corporation,
et al.,

Defendants.

**Opinion on Motion to Dismiss Amended Bill of
Complaint.**

JOHN E. BENNETT & JESSE OLNEY, Solicitors
and Counsel for Complainant.

GAVIN McNAB, B. M. AIKINS, R. P. HEN-
SHALL, R. R. MOODY, N. SCHMULOWITZ
and LUTHER ELKINS, Solicitors and Coun-
sel for Defendants.

This matter having been heretofore argued and

submitted, the Court is of the opinion:

1. That the Court has jurisdiction of the subject matter;

2. That the Palmer Senior Oil Company and the bondholders of the Palmer Union Company are necessary parties, but that the creditors of the Palmer Oil Company are not necessary parties hereto;

3. That the amended bill should contain the usual caption showing the parties plaintiff and defendant;

4. That the bill sufficiently complies with the requirements of the second, third and fourth subdivisions of Equity Rule 25;

5. That there is a misjoinder of causes of action in that the bill seeks to set aside a transfer, and seeks also to recover from the directors the value of the property transferred;

6. That there is a misjoinder of causes of action in that the bill seeks to set aside a transfer, and seeks also to [62] recover the consideration for such transfer from the transferee;

7. That the facts set forth are sufficient to constitute a valid cause of action in equity;

8. That by reason of the nonjoinder of necessary parties, and the misjoinder of causes of action the bill should be dismissed.

The motion to dismiss is, therefore, granted.

March 2d, 1914.

MAURICE T. DOOLING,

Judge.

[Endorsed]: Filed Mar. 2, 1914. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [63]

At a stated term, to wit, the March Term, A. D. 1914, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the courtroom, in the City and County of San Francisco, on Monday, the 2d day of March, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable MAURICE T. DOOLING, District Judge.

No. 45—EQUITY.

ANDREW CLAUSS

vs.

PALMER OIL CO. et al.

Order Dismissing Suit.

Defendants' motion to dismiss the amended bill of complaint herein, heretofore heard and submitted, being now fully considered and the Court having filed its memorandum opinion, it was ordered in accordance therewith that said motion be and the same is hereby granted, and that this suit be and the same is hereby dismissed. [64]

*In the District Court of the United States in and for
the Northern District of California, Second
Division.*

IN EQUITY—No. 45.

ANDREW CLAUSS,

Plaintiff,

vs.

PALMER UNION OIL COMPANY, a Corpora-
tion, et al.,

Defendants.

Decree Dismissing Amended Bill of Complaint.

The motion of the defendants herein to dismiss the Amended Bill of Complaint herein having been granted, and an order having been made and entered herein that a decree be granted accordingly:

It is hereby ORDERED, ADJUDGED and DECREED, that the Amended Bill of Complaint of Andrew Clauss, the plaintiff herein, be, and the same is, hereby dismissed, and that the defendants do have and recover from plaintiff their costs, taxed at _____ dollars (\$_____).

Dated this 4 day of March, 1914.

M. T. DOOLING,

Judge.

[Endorsed]: Filed and entered March 4, 1914.
Walter B. Maling, Clerk. By J. A. Schaertzer,
Deputy Clerk. [65]

[**Motion to Amend Order of March 2, 1914; to Vacate Decree of March 4, 1914, and to Amend Amended Complaint.**]

In the District Court of the United States, in and for the Northern District of California, Second Division.

IN EQUITY—No. 45.

ANDREW CLAUSS,

Plaintiff,

vs.

PALMER UNION OIL COMPANY, a Corporation,
et al.,

Defendants.

MOTION TO AMEND THE ORDER OF THIS COURT, DATED AND ENTERED MARCH 2d, 1914, AND TO VACATE AND SET ASIDE THE DECREE HERETOFORE ENTERED IN THIS CAUSE OF DATE MARCH 4th, 1914, AND FOR AN ORDER GRANTING LEAVE TO PLAINTIFF TO AMEND HIS AMENDED BILL OF COMPLAINT.

To the Honorable, the Judges of the United States District Court in and for the Northern District of California, Second Division:

Comes now Andrew Clauss, the plaintiff above named, and shows to the Court:

First, that the order heretofore entered by this Court on the 2d day of March, 1914, in the following words:

“Defendant’s motion to dismiss the Amended Bill of Complaint herein, heretofore heard and submitted, being now fully considered and the Court having filed its memorandum opinion, it was ordered in accordance therewith that said motion be and the same is hereby granted, and that this suit be, and the same is hereby, dismissed.”

That the said order was entered by the clerk of this court on said 2d day of March, without notice in any form thereof to the plaintiff, and that the same is erroneous in that no opportunity was given to the plaintiff to amend his said bill of complaint in accordance with said memorandum opinion, or to make application for leave to make such amendment, and in dismissing said suit without giving to the plaintiff such opportunity to amend his said complaint, the clerk of this court never [66] having mailed or otherwise sent or delivered to the plaintiff, or his attorneys herein, any notice of or otherwise informing plaintiff or his said attorneys of the existence or entry of said order, until Friday, the 6th day of March, 1914.

That two days after said 2d day of March, 1914, to wit, on the 4th day of March, 1914, the following decree was entered by this Court in this cause, viz.:

“The motion of the defendants herein, to dismiss the Amended Bill of Complaint herein, having been granted, and an order having been made and entered herein that a decree be granted accordingly:

It is hereby ORDERED, ADJUDGED and DECREED, that the Amended Bill of Complaint of Andrew Clauss, the plaintiff herein, be, and the same is, hereby dismissed, and that the defendants do have and recover from plaintiff their costs, taxed at ——— dollars (\$———).

Dated this 4th day of March, 1914.

M. T. DOOLING,
Judge.

[Endorsed]: Filed and entered March 4th, 1914. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk."

That said decree was entered without any notice to the plaintiff or his attorneys herein, in any manner or form whatever, that the same had been rendered, or any notice to him or his said attorneys, that the said order above mentioned had been entered in the said cause; and that the plaintiff and his attorneys had no knowledge of the fact that either said order or said decree had been rendered or entered in this cause, until informed thereof by the deputy clerk of this court, Mr. Schaertzer, on Friday morning, March 6th, 1914, in a casual [67] conversation on a railroad train coming to San Francisco, and the said decree was inadvertently, improvidently and improperly entered in this cause.

Whereupon the plaintiff above named moves this Honorable Court that the said order heretofore rendered in this cause on the second day of March, 1914, which said order was duly entered on that day, be amended and corrected by striking out the concluding words thereof, to wit: "That this suit be

and the same is hereby dismissed," and inserting instead thereof the following words: "and that unless the plaintiff within a reasonable time amends his said Amended Bill in manner and form to remove the defects therein declared in the Court's aforesaid memorandum opinion, that this suit be and is hereby dismissed without prejudice."

That said decree dismissing said Amended Bill of Complaint dated the 4th day of March, 1914, be vacated and set aside and held for naught.

That plaintiff above named further moves this Honorable Court that he may be at liberty to amend his said Amended Bill of Complaint in the following particulars:

First: That said Amended Bill of Complaint be dismissed without prejudice, as to the following defendants, viz.: Anglo-California Trust Company, a corporation, Frank L. Brown, J. C. Kemp Van Ee, Lewis A. Hilborn, George L. Walker, Charles E. Ladd, H. C. Stratton, Gavin McNab and George I. Stewart, as individuals and as directors either of said Palmer Union Oil Company or as directors of said Palmer Oil Company.

Second: That there be stricken from the first prayer of said Amended Bill of Complaint, the last line thereof which reads as follows: "or to a receiver, if such receiver be appointed as hereinafter prayed." [68]

Third: That the prayers for relief contained in said Amended Bill of Complaint numbered 3, 5, 6, and 7 be stricken out.

Fourth: That so much of said Amended Bill of

Complaint beginning with the words "California, having its principal place of business at Sisquoc," etc., at line 30, page 1 of said Amended Bill of Complaint, and ending with the word "capacities," at line 14, on page 2 of said Amended Bill, be stricken out, and that there be inserted in lieu thereof the following: "California, having its principal place of business in the City and County of San Francisco, State of California, and Frank L. Brown, J. C. Kemp Van Ee, Lewis A. Hilborn, H. C. Stratton and Charles E. Ladd, in so far as they claim to be, or may be found to be, Trustees of said Palmer Oil Company, the said Frank L. Brown, J. C. Kemp Van Ee, Lewis A. Hilborn, H. C. Stratton and Charles E. Ladd, claiming that said Palmer Oil Company has been dissolved and no longer exists as a corporation. Complainant alleges on information and belief that there are no creditors existing of said Palmer Oil Company."

Fifth: That the title of this cause in said Amended Bill of Complaint be amended to read as follows:

ANDREW CLAUSS,

Plaintiff,

vs.

PALMER UNION OIL COMPANY, a Corporation,
FRANK L. BROWN, LEWIS A. HIL-
BORN, GEORGE L. WALKER, CHARLES
E. LADD, GAVIN McNAB, H. C. STRAT-
TON and GEORGE I. STEWART, as Direct-
ors of Said PALMER UNION OIL COM-

PANY and in Their Respective and Individual Capacities, FRANK L. BROWN, J. C. KEMP VAN EE, LEWIS A. HILBORN, H. C. STRATTON and CHARLES E. LADD, as Directors of PALMER OIL COMPANY, a Corporation, and in Their Respective Individual Capacities, ANGLO-CALIFORNIA TRUST COMPANY, a Corporation, FIRST DOE, SECOND DOE, THIRD DOE, FOURTH DOE, FIFTH DOE, SIXTH DOE, SEVENTH DOE, EIGHTH DOE, NINTH DOE, TENTH DOE, PALMER OIL COMPANY, a Corporation,

Defendants. [69]

Sixth: And complainant prays for such further and other relief as to the Court may seem meet and equitable.

Dated March 10th, 1914.

JESSE OLNEY,

JOHN E. BENNETT,

Solicitors for Complainant.

[Endorsed]: Filed Mar. 10, 1914. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [70]

*In the District Court of the United States, in and for
the Northern District of California, Second
Division.*

No. 45—EQ.

ANDREW CLAUSS,

Plaintiff,

vs.

PALMER UNION OIL COMPANY, a Corporation,
et al.,

Defendants.

**Opinion and Order Denying a Motion for Leave to
File an Amended Bill of Complaint.**

JOHN E. BENNETT and JESSE OLNEY, Soli-
citors and Counsel for Complainant.

GAVIN McNAB, B. M. AIKINS, R. P. HEN-
SHALL, R. R. MOODY, N. SCHMULOWITZ
and LUTHER ELKINS, Solicitors and Coun-
sel for Defendants.

This is a motion for leave to file an amended bill of complaint, or rather to file amendments to a bill of complaint heretofore dismissed by the Court. It was held in dismissing the bill that the Court had jurisdiction of the subject matter, but in so holding the Court was only passing upon the question as to the amount involved in the controversy. The action is one brought by a single stockholder of the Palmer Oil Company, a California corporation, such stockholder being a citizen of the State of Ohio, and owning one thousand shares of stock, which, as may be gathered from other averments of the bill, are

worth not to exceed fifteen hundred dollars. The relief sought is the setting aside, on the ground of fraud, of a transfer made by the corporation of property stated to be worth \$2,500,000.00, the plaintiff averring that the action is brought on behalf of himself and all others similarly situated. After the filing of said bill, a petition was presented by the attorneys for plaintiff on behalf of [71] fifteen other stockholders of said Palmer Oil Company asking leave to intervene, and such leave having been granted by the Court, said attorneys filed a bill of intervention by said fifteen stockholders identical in all essential particulars with the original complaint. In this bill of intervention twelve of the plaintiffs owning 125,567 shares are citizens of California, and three owning 3,500 shares are citizens of other States. So that if the present motion were granted, we would have a situation with four plaintiffs citizens of other States owning in all 4,500 shares, and twelve plaintiffs citizens of California owning 125,567 shares, all in this court clinging to the complaint of a single stockholder, resident of Ohio, owning but 1,000 shares; and all represented by the attorneys of the original plaintiff. Under these circumstances, aside from the fact that the proposed amendments are for the most part amendments to the prayer of the original bill, and not amendments to the bill itself, the motion to amend will be denied, and it is so ordered.

April 3d, 1914.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Apr. 3, 1914. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [72]

At a stated term, to wit, the March term, A. D. 1914, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Friday, the 3d day of April, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable MAURICE T. DOOLING, District Judge.

No. 45—EQUITY.

ANDREW CLAUSS,

vs.

PALMER UNION OIL CO. et als.

Order Denying Motion to Amend Order of March 2, 1914, etc.

Plaintiff's motion to amend the order entered herein on March 2d, 1914, to vacate and set aside the decree herein, and for leave to amend the amended bill, heretofore heard and submitted, being now fully considered and the Court having filed its opinion thereon, it is ordered that said motion be and the same is hereby denied. [73]

*In the District Court of the United States, in and for
the Northern District of California, Second
Division.*

NO. 45—IN EQUITY.

ANDREW CLAUSS,

Plaintiff,

vs.

PALMER UNION OIL COMPANY, a Corporation,
FRANK L. BROWN, LEWIS A. HIL-
BORN, GEORGE L. WALKER, CHARLES
E. LADD, GAVIN McNAB, H. C. STRAT-
TON and GEORGE I. STEWART, as Direct-
ors of Said PALMER UNION OIL COM-
PANY and in Their Respective and Individual
Capacities, FRANK L. BROWN, J. C.
KEMP VAN EE, LEWIS A. HILBORN,
H. C. STRATTON and CHARLES E. LADD,
as Directors of PALMER OIL COMPANY,
a Corporation, and in Their Respective and
Individual Capacities, ANGLO-CALIFOR-
NIA TRUST COMPANY, a Corporation,
FIRST DOE, SECOND DOE, THIRD DOE,
FOURTH DOE, FIFTH DOE, SIXTH
DOE, SEVENTH DOE, EIGHTH DOE,
NINTH DOE, TENTH DOE, PALMER OIL
COMPANY, a Corporation,

Defendants.

Petition for Allowance of Appeal.

To the Honorable M. T. DOOLING, Sitting in the
Above-entitled Court:

The above-named complainant, and Victor Enginger, W. A. Grubb, Joseph Hamm, K. Halter, L. Schott, L. Lait, E. W. Clark, Jean A. Gourselle, M. C. Brooke, H. L. Brooke, Jesse W. Olney, Lilly M. Stewart, Theodore B. Wilcox, F. L. Shull, and Alvin J. Whitman, coplaintiffs and interveners in the above-entitled cause, conceiving themselves aggrieved by the final decree made and entered in the above-entitled cause March 4, 1914, dismissing the bill of complaint herein, and by the interlocutory orders of said Court of January 26, 1914, vacating the decree *pro confesso* theretofore entered against Palmer Union Oil Company, Lewis A. Hilborn and Palmer Oil Company, defendants, and March 2, 1914, ordering the suit of complainant herein to be dismissed, and also by the order of said [74] Court of April 3, 1914, denying complainant's motion for leave to amend his amended bill of complaint, and to amend said order of March 2, 1914, and to vacate said final decree of March 4, 1914, do hereby appeal from the said orders and decree to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, for the reasons specified in the assignment of errors on file herein, and pray that this appeal may be allowed, and also that an order be made fixing the amount of the bond on such appeal, and that a transcript of the record, papers and proceedings upon which said orders and decree were made, duly

authenticated, may be sent to the United States Court of Appeals for the Ninth Judicial Circuit.

JOHN E. BENNETT,

JESSE OLNEY,

Solicitors for Complainant, and for said Coplaintiffs and interveners.

[Endorsed]: Filed Apr. 7, 1914. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [75]

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 45—IN EQUITY.

ANDREW CLAUSS,

Plaintiff,

vs.

PALMER UNION OIL COMPANY, a Corporation, FRANK L. BROWN, LEWIS A. HILBORN, GEORGE L. WALKER, CHARLES E. LADD, GAVIN McNAB, H. C. STRATTON, and GEORGE I. STEWART, as Directors of Said PALMER UNION OIL COMPANY, and in Their Respective and Individual Capacities, FRANK L. BROWN, J. C. KEMP VAN EE, LEWIS A. HILBORN, H. C. STRATTON and CHARLES E. LADD, as Directors of PALMER OIL COMPANY, a Corporation, and in Their Respective Individual Capacities, ANGLO-CALIFORNIA TRUST COMPANY, a Corporation, FIRST

DOE, SECOND DOE, THIRD DOE,
FOURTH DOE, FIFTH DOE, SIXTH
DOE, SEVENTH DOE, EIGHTH DOE,
NINTH DOE, TENTH DOE, PALMER
OIL COMPANY, a Corporation,
Defendants.

Assignment of Errors.

Comes now the above-named complainant, and Victor Enginger, W. A. Grubb, Joseph Hamm, K. Halter, L. Schott, L. Lait, E. W. Clark, Jean A. Gourselle, M. C. Brooke, H. L. Brooke, Jesse W. Olney, Lilly M. Stewart, Theodore B. Wilcox, F. L. Shull, and Alvin J. Whitman, all coplaintiffs and interveners, in the above-entitled cause, and specify and file the following assignment of errors upon which they will rely upon their appeal from the final decree filed and entered in the above-entitled action, March 4, 1914, dismiss the bill of complaint herein and from the interlocutory orders of said Court of January 26, 1914, vacating the decree *pro confesso* theretofore entered against Palmer Union Oil Company, a corporation, Lewis A. Hilborn, and Palmer Oil Company, a corporation, defendants, and the order of said Court of March 2, 1914, ordering the suit of complainant herein to be dismissed, and also from the order of said Court of April 3, 1914, denying complainant's [76] motion for leave to amend his amended bill, and to amend said order of March 2, 1914, and to vacate said final decree of March 4, 1914, in the above-entitled cause:

1. That the above-entitled court erred in granting the motions interposed by defendants Palmer

Union Oil Company, a corporation, and Lewis A. Hilborn, to vacate and set aside the decree *pro confesso* entered against them, and in vacating and setting aside said decree *pro confesso* by its said order of January 26, 1914;

2. That the said Court erred in vacating and setting aside of its own motion the decree *pro confesso* entered herein against the defendant Palmer Oil Company, a corporation, by its said order of January 26, 1914;

3. That said Court erred in granting the motions to dismiss the amended bill of complaint filed on behalf of the several defendants (excepting the Palmer Oil Company, a corporation, which entered no appearance in said cause).

4. That said Court erred in its order of March 2, 1914, entered upon said motions, which directed that "this *suit* be and the same is hereby dismissed."

5. That said Court erred in dismissing said amended bill of complaint and entering final decree thereon, March 4, 1914, in favor of said defendants;

6. That said Court erred in denying the motion interposed by the complainant to amend the said order of the Court of March 2, 1914, and to vacate and set aside said decree of March 4, 1914, and for leave to amend his amended bill of complaint, and by making and entering its said order to that effect on April 3, 1914.

Now, in order that the foregoing assignment of errors may be and appear of record, complainant, and the said coplaintiffs [77] and interveners, present the same to the Court, and pray that such

disposition thereof be made as is in accordance with law and the statutes of the United States in such cases made and provided, with equity, and with the new equity rules of this court, and pray that the said orders and the decree dismissing said complainant's amended bill of complaint be reversed.

JOHN E. BENNETT,

JESSE OLNEY,

Solicitors for Complainant, and for said Coplaintiffs
and Interveners.

[Endorsed]: Filed Apr. 7, 1914. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [78]

*In the District Court of the United States, in and
for the Northern District of California, Second
Division.*

No. 45—IN EQUITY.

ANDREW CLAUSS,

Plaintiff,

vs.

PALMER UNION OIL COMPANY, a Corpora-
tion, FRANK L. BROWN, LEWIS A. HIL-
BORN, GEORGE L. WALKER, CHARLES
E. LADD, GAVIN McNAB, H. C. STRAT-
TON, and GEORGE I. STEWART, as Di-
rectors of Said PALMER UNION OIL
COMPANY, and in Their Respective and In-
dividual Capacities, FRANK L. BROWN, J.
C. KEMP VAN EE, LEWIS A. HILBORN,
H. C. STRATTON, and CHARLES E. LADD,
as Directors of PALMER OIL COMPANY, a

Corporation, and in Their Respective and Individual Capacities, ANGLO-CALIFORNIA TRUST COMPANY, a Corporation, FIRST DOE, SECOND DOE, THIRD DOE, FOURTH DOE, FIFTH DOE, SIXTH DOE, SEVENTH DOE, EIGHTH DOE, NINTH DOE, TENTH DOE, PALMER OIL COMPANY, a Corporation,
Defendants.

Order Allowing Appeal.

On filing the petition of complainant, and of Victor Enginger, W. A. Grubb, Joseph Hamm, K. Halter, L. Lait, E. W. Clark, Jean A. Gourselle, M. C. Brooke, H. L. Brooke, Jesse W. Olney, Lilly M. Stewart, Theodore B. Wilcox, F. L. Shull, and Alvin J. Whitman, coplaintiffs and interveners, for an order allowing an appeal, together with an assignment of errors;

It is ordered that an appeal to the United States Circuit Court of Appeals, for the Ninth Judicial Circuit, from the final decree heretofore filed and entered herein March 4, 1914, and from the interlocutory orders of January 26, 1914, and March 2, 1914, and from the order of April 3, 1914, be, and the same hereby is, allowed, and that a certified transcript of the record, papers and proceedings upon which said orders and decree were made, duly authenticated, be forthwith transmitted to said United States Circuit Court of Appeals; [79]

It is further ordered that the bond on appeal be fixed at the sum of Five Hundred Dollars.

Done in open court this 8th day of April, 1914.

M. T. DOOLING,

Judge.

[Endorsed]: Filed Apr. 8, 1914. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [80]

30,305—14.

UNITED STATES FIDELITY AND GUARANTY
COMPANY.

Capital Paid in Cash \$2,000,000. Total Resources
Over \$6,000,000.

Home Office:
Baltimore, Md.

*In the District Court of the United States, in and for
the Northern District of California, Second
Division.*

ANDREW CLAUSS,

Plaintiff,

vs.

PALMER UNION OIL COMPANY, a Corporation,
FRANK L. BROWN, LEWIS A. HIL-
BORN, GEORGE L. WALKER, CHARLES
E. LADD, GAVIN McNAB, H. C. STRAT-
TON and GEORGE I. STEWART, as Direct-
ors of Said PALMER UNION OIL COM-
PANY and in Their Respective and Individual
Capacities, FRANK L. BROWN, J. C.
KEMP VAN EE, LEWIS A. HILBORN,
H. C. STRATTON and CHARLES E. LADD,
as Directors of PALMER OIL COMPANY,
a Corporation, and in Their Respective and

Individual Capacities, ANGLO-CALIFORNIA TRUST COMPANY, a Corporation, FIRST DOE, SECOND DOE, THIRD DOE, FOURTH DOE, FIFTH DOE, SIXTH DOE, SEVENTH DOE, EIGHTH DOE, NINTH DOE, TENTH DOE, PALMER OIL COMPANY, a Corporation,

Defendants.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS: That, WHEREAS, lately in the District Court of the United States in and for the Northern District of California, Second Division, in a suit pending in said court between Andrew Clauss, complainant, and Palmer Union Oil Company, a corporation, and Frank L. Brown, Lewis A. Hilborn, George L. Walker, Charles E. Ladd, Gavin McNab, H. C. Stratton and George I. Stewart, as Directors of said Palmer Union Oil Company, and in their respective and individual capacities, Frank L. Brown, J. C. Kemp Van Ee, [81] Lewis A. Hilborn, H. C. Stratton and Charles E. Ladd, as directors of Palmer Oil Company, a corporation, and in their respective and individual capacities, Anglo-California Trust Company, a corporation, and Palmer Oil Company, a corporation, defendants, a final decree and certain orders were rendered against said Andrew Clauss, complainant, and the said complainant having obtained from said Court an order allowing an appeal to the United States Circuit Court of Appeals, for the Ninth Judicial District, to reverse the decree and orders in the aforesaid suit, and a citation directed

to said aforesaid defendants is about to be issued, citing and admonishing them to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, California:

NOW THEREFORE, in consideration of the premises and of such appeal the United States Fidelity & Guaranty Company, a corporation organized under the laws of the State of Maryland and having its principal place of business in the city of Baltimore, and having a paid-up capital and surplus of Two Million (\$2,000,000) Dollars, duly incorporated under the laws of the said State of Maryland, for the purpose of making and guaranteeing and becoming surety upon bonds or undertakings required or authorized by law, is held and firmly bound unto the above-named defendants in the full and just sum of Five Hundred (\$500) Dollars, lawful money of the United States of America, for which payment, well and truly to be made, said United States Fidelity & Guaranty Company, a corporation, binds itself by these presents:

The condition of the above obligation is such that if the said Andrew Clauss, complainant, and Victor Enginger, W. A. Grubb, Joseph Hamm, K. Halter, L. Schett, L. Lait, E. W. Clark, Joan A. Gourselle, M. C. Brooke, H. L. Brooke, Jesse W. Olney, Lilly M. Stewart, Theodore B. Wilcox, F. L. Shull and Alvin J. Whitman, [82] coplaintiffs and interveners and appellants, together with said complainant, shall prosecute their appeal to effect and shall answer all damages and costs that may be awarded against them, if they fail to make their plea good,

then the above obligation to be void; otherwise to remain in full force and virtue;

IN WITNESS WHEREOF, the said United States Fidelity & Guaranty Company has caused this obligation to be signed by its duly authorized attorney-in-fact, and its corporate seal to be hereunto affixed at San Francisco, California, this 8th day of April, 1914.

UNITED STATES FIDELITY & GUAR-
ANTY COMPANY.

[Seal]

By JESSE M. WHITED,
Attorney-in-Fact.

Approved April 9th, 1914.

M. T. DOOLING,
Judge.

State of California,

City and County of San Francisco,—ss.

On this 8th day of April, in the year one thousand nine hundred and 14, before me, Alice Spencer, a notary public in and for the City and County of San Francisco, personally appeared Jesse M. Whited, known to me to be the persons whose names are subscribed to the within instrument as the attorney-in-fact of the United States Fidelity and Guaranty Company, and acknowledged to me that they subscribed the name of the United States Fidelity and Guaranty Company thereto as principal, and their own names as attorneys-in-fact.

[Seal]

ALICE SPENCER,
Notary Public in and for the City and County of San
Francisco, State of California. [83]

[Endorsed]: Filed Apr. 9, 1914. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [84]

Docket, United States District Court.

Docket 45. ANDREW CLAUSS,	Title of Case. vs.	Attorneys. JESSE OLNEY — JOHN E. BENNETT. Eq. To restrain sale of stocks, etc. GAVIN McNAB, R. P. HENSHALL, ROBERT R. MOODY. BRONTE M. AIKINS.
PALMER UNION OIL COMPANY et al.		

Date. Month. Day. Year.	Filings—Proceedings.
Oct. 7, 1913.	Filed Bill of Complaint. Issued <i>Subpoena ad Res</i> and 5 copies.
“ 8, “	Filed Order to Show Cause and Restraining Order. Filed Undertaking on Restraining Order made <i>certi</i> -copy of Restraining Order
“ 11, “	Filed Amendment to Bill. Filed Affidavit of Lewis A. Hilborn. Ord. Application for Injunction argued, submitted and denied and restraining order dissolved. Filed <i>Subpoena ad Res</i> , with Marshal's Return showing service on Lewis A. Hilborn & Palmer Union Oil Co. on Oct. 8, 1913.
“ 15, “	Filed Application for Order to Take Deposition.
“ 16, “	Issued Subpoena for witness.
“ 21, “	Filed Subpoena. Filed Deposition of H. C. Stratton. Filed Notice of Motion to tax costs of deposition against deft. Filed Affidavit of service.
“ 25, “	Ord. motion con. to Nov. 1.
“ 27, “	Made 2 certified copies of <i>Subpoena ad Res</i> .
“ 28, “	Taking Oath and Jurat to Affidavit. Filed Affidavit and Order directing absent defendant to appear, etc. Made certified copy of order. Filed Order extending time to plead. Entered Order (O. B. No. 1, p. 131). Filed Answer of Hilborn & Palmer Union Oil Co. [85]

Date.

Month. Day. Year.

- Nov. 1, 1913. Filed Petition to Tax Cost of Taking of Deposition. Ord. mo. to tax costs con. to 8.
- “ 4, “ Filed Order Extending Time.
- “ 5, “ Filed Appearance of Frank L. Brown.
- “ 7, “ Filed Petition to Intervene. Filed Order allowing V. Enginger et al. to Intervene. Entered Order (O. B. No. 1, p. 137). Filed Bill of Intervention of V. Enginger et al. Filed Petition. Filed Order Making W. H. James a Complainant. Entered Order (O. B. No. 1, p. 138). Filed Bill of Intervention of William H. James.
- “ 8, “ Filed Motion to Dismiss Bill. Ord. petition for order taxing costs argued and submitted.
- “ 13, “ Filed Order Denying Petition, etc. Ord. petition for order taxing cost of taking deposition denied. Made 2 copies of order and mailed same to plff. and 1 to defts.
- “ 15, “ Oath and Jurat to Affidavit of Olney. Filed Petition for leave to amend bill. Filed Order granting leave to amend bill. Entered Order (O. B. No. 1, p. 147). Filed Amended Bill of Complaint. Filed praecipe. Issued *Subpoena ad Res* and 1 copy.
- “ 17, “ Filed Affidavit of Service of Amended Bill. Filed Marshal's Return of Service of Warning Order.
- “ 25, “ Filed Motion of Palmer Union Oil Co. to Dismiss. Filed Motion of Geo. I. Stewart to Dismiss. Filed Motion of Anglo-California Trust Co. to Dismiss. Filed Motion of Brown et al. to Dismiss Amended Bill.
- Dec. 5, “ Filed *Subpoena ad Res*. with Marshal's Return showing service on Palmer Oil Co. on Dec. 4, 1913.

Date.

Month. Day. Year.

Dec. 30, 1913. Filed Motion of J. C. Kemp Van Ee to Dismiss.

“ 30, “ Amended bill.

[86]

Jan. 19, 1914. Filed Praecipe. Entered Order Taking Bill *Pro Confesso*. (O. B. No. 1, p. 178.) Mailed 3 copies to defendant's attorneys.

“ 21, 1914. Filed Notice of Motion to Vacate Order *Pro Confesso*. Filed Notice of Motion to Set Hearing of Motion to Dismiss. Filed Notice of Motion to Vacate Order, etc. Filed Notice of Motion to Set Hearing, etc. Filed Notice of Motion to Vacate Order, etc. Filed Notice of Motion to Set Hearing, etc. Filed Notice of Motion to Vacate Order, etc. Filed Notice of Motion to Set Hearing, etc. Filed Notice of Motion to Vacate Order, etc. Filed Notice of Motion to Set Hearing, etc. Filed Affidavit of Gavin McNab. Filed Order Setting Time for hearing of Motions, etc. Entered Order (O. B. No. 1, p. 186).

“ 22, “ Filed Stipulation continuing hearing of Motions.

“ 26, “ Filed Mem. of Authorities on Motion to Vacate Order. Filed Mem. of Authorities on Motions to Dismiss. Ord. motions to vacate order taking amended bill *pro confesso* argued, submitted and granted, etc., and motions to dismiss con. to 29.

“ 29, “ Filed Supplemental Memorandum of Authorities. Ord. motions to dismiss argued and submitted.

Mar. 2, “ Filed Opinion on Motions to dismiss. Ord. motions to dismiss amended bill granted and cause dismissed. Made 3 copies of Order dismissing cause. Mailed copy of Order. to Atty. for Plff. Mailed copy of order to Attys. for Defts. Mailed copy of Order to [87] Atty. for Intervenors.

Date.

Month. Day. Year.

- Mar. 4, 1914. Filed and entered Decree dismissing amended bill. (Eq. Journal No. 1, p. 270.) Made and filed Enrolled Papers. Dockets. Made and mailed copy of Decree to Plff. Made and mailed copy of Decree to Atty. for Inter-venors.
- “ 10, “ Filed Motion to Amend Order and Vacate Decree, etc. Filed Notice of Motion to Amend, etc. Filed Affidavit of service of Motion, etc.
- “ 19, “ Filed Plff's Mem. of Authorities.
- “ 21, “ Ord. motion con. to 28.
- “ 28. “ Ord. motion to amend, etc., argued and submitted.
- Apr. 3, “ Filed Opinion and Order Denying Motion, etc. Ord. motion to vacate decree and for leave to file an amended bill denied. Made 2 copies of Order. Mailed 1 to plff's attys. and 1 to deft's attys.
- “ 7, “ Filed Petition for Appeal. Filed Assignment of Errors. Filed Praecipe for Transcript.
- “ 8, “ Filed Order Allowing Appeal. Filed Appeal Bond.
- “ 14. “ Filed Citation. [88]

*In the District Court of the United States, in and for
the Northern District of California, Second
Division.*

No. 45—IN EQUITY.

ANDREW CLAUSS,

Plaintiff,

vs.

PALMER UNION OIL COMPANY, a Corporation,
et als.,

Defendants.

Praecipe for Transcript.

To Walter B. Maling, Esqr., Clerk of the Above-entitled Court:

You will please transmit the following certified transcript of the record, papers, and proceedings in the above-entitled cause to the United States Circuit Court of Appeals for the Ninth Circuit, as follows:

1. Amended Bill of Complaint.
2. Certificate by yourself as Clerk showing Docket Entry of the filing of Answer by Palmer Union Oil Company and Lewis A. Hilborn, to original bill of complaint, and date thereof.
3. Subpoena issued to Palmer Oil Company, a corporation, defendant, and return of service by U. S. Marshal thereon.
4. Notice of motion to vacate decree *pro confesso* by Palmer Union Oil Company, and affidavit of Gavin McNab, attached thereto.
5. Notice of motion to vacate decree *pro confesso* by Lewis A. Hilborn, and affidavit of Gavin McNab attached thereto.
6. Order vacating said decree *pro confesso* against all defendants.
7. Motion to dismiss amended bill of complaint by all defendants.
8. Memorandum of Opinion dated March 2, 1914.
9. Order of March 2, 1914, dismissing suit. [89]
10. Final Decree of March 4, 1914.
11. Complainant's motion dated March 10th, 1914, to amend said order, vacate said decree, and praying leave to amend.

12. Memorandum of opinion of April 3, 1914.

13. Order thereof of April 3, 1914.

14. Order *pro confesso*—Jan. 19, 1914.

Dated April 7th, 1914.

JOHN E. BENNETT,

JESSE OLNEY,

Solicitors for Complainant.

[Endorsed]: Filed Apr. 7, 1914. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [90]

[Certificate of Clerk U. S. District Court to
Transcript of Record on Appeal.]

*In the District Court of the United States, in and
for the Northern District of California, Second
Division.*

No. 45—IN EQUITY.

ANDREW CLAUSS,

Plaintiff,

vs.

PALMER UNION OIL COMPANY, a Corporation,
et als.,

Defendants.

I, Walter B. Maling, Clerk of the District Court of the United States in and for the Northern District of California, do hereby certify the foregoing ninety (90) pages, numbered from 1 to 90, inclusive, to be a full, true and correct copy of the Amended Bill of Complaint; Subpoena ad Respondendum; Motion of Palmer Union Oil Company to Dismiss Amended Bill of Complaint; Motion of George I.

Stewart and Gavin McNab to Dismiss Amended Bill of Complaint; Motion of Anglo-California Trust Company to Dismiss Amended Bill of Complaint; Motion of Frank L. Brown, Lewis A. Hilborn, George L. Walker, Charles E. Ladd and H. C. Stratton to Dismiss Amended Bill of Complaint; Motion of J. C. Kemp Van Ee to Dismiss Amended Bill of Complaint; Order *Pro Confesso*; Notice of Motion for an Order Vacating Decree *Pro Confesso*; Notice of Motion for an Order Vacating Decree *Pro Confesso*; Affidavit of Gavin McNab; Order Granting Motion to Vacate Order Taking Amended Bill *Pro Confesso*; Opinion on Motion to Dismiss Amended Bill of Complaint; Order Dismissing Suit; Decree Dismissing Amended Bill of Complaint; Motion to Amend the Order of this Court dated and entered March 2d, 1914, and to vacate and set aside the decree heretofore entered in this cause of date March 4th, 1914, and for an order granting leave to plaintiff to amend his amended bill of complaint; Opinion and Order Denying a Motion for Leave to File an amended Bill of Complaint; [91] Order Denying Motion to Amend Order of March 2, 1914; Petition for Allowance of Appeal; Assignment of Errors; Order Allowing Appeal; Bond on Appeal; to be included in Transcript on Appeal filed with this Praecipe, and that the same constitute the record on appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, as requested in said praecipe.

I further certify that the cost of the foregoing transcript of record on appeal is \$50.00, that said

amount was paid by Jesse Olney, Esq., attorney for appellant, and that the original citation issued in said cause is hereto annexed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 28th day of May, A. D. 1914.

[Seal]

WALTER B. MALING,
Clerk of United States District Court, Northern
District of California. [92]

[Citation on Appeal (Original).]

UNITED STATES OF AMERICA,—ss.

The President of the United States to Palmer Union Oil Company, a Corporation, Frank L. Brown, Lewis A. Hilborn, George L. Walker, Charles E. Ladd, Gavin McNab, H. C. Stratton and George I. Stewart, as Directors of Said Palmer Union Oil Company, and in Their Individual Capacities, Frank L. Brown, J. C. Kemp Van Ee, Lewis A. Hilborn, H. C. Stratton, and Charles E. Ladd, as Directors, of Palmer Oil Company, a Corporation, and in Their Respective and Individual Capacities, Anglo-California Trust Company, a Corporation, Palmer Oil Company, a Corporation, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, on the 9th day of May, 1914, being within thirty days from the date hereof, pursuant to an Order Allowing Appeal

filed in the clerk's office of the District Court of the United States, for the Northern District of California, wherein Andrew Clauss, Victor Enginger, W. A. Grubb, Joseph Hamm, K. Halter, L. Schott, L. Lait, E. W. Clark, Jean A. Gourselle, M. C. Brooke, H. L. Brooke, Jesse W. Olney, Lilly M. Stewart, Theodore B. Wilcox, F. L. Shull, and Alvin J. Whitman are appellants, and you are appellees, to show cause, if any there be, why the Orders and Decree rendered against the said appellants, as in the said Order Allowing Appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable MAURICE T. DOOLING, United States District Judge for the Northern District of California, this 9th day of April, A. D. 1914.

M. T. DOOLING,
United States District Judge.

Service of within Citation, by copy, admitted this 9th day of April, A. D. 1914.

GAVIN McNAB,
R. P. HENSHALL,
B. M. AIKINS,
LUTHER ELKINS,
R. R. MOODY,

Attorneys for Defendants.

[Endorsed]: No. 45—Eq. In the District Court of the United States for the Ninth Circuit, Northern District of California. Andrew Clauss vs. Palmer Union Oil Company, a corp., et al. Citation. Filed

April 14, 1914. Walter B. Maling, Clerk. By
———, Deputy Clerk. [93]

[Endorsed]: No. 2428. United States Circuit Court of Appeals for the Ninth Circuit. Andrew Clauss, Victor Enginger, W. A. Grubb, Joseph Hamm, K. Halter, L. Schott, L. Lait, E. W. Clark, Jean A. Gourselle, M. C. Brooke, H. L. Brooke, Jesse W. Olney, Lilly M. Stewart, Theodore B. Wilcox, F. L. Shull and Alvin J. Whitman, Appellants, vs. Palmer Oil Company, a Corporation, Frank L. Brown, Lewis A. Hilborn, George L. Walker, Charles E. Ladd, Gavin McNab, H. C. Stratton and George I. Stewart, as Directors of Said Palmer Union Oil Company, and in Their Individual Capacities, Frank L. Brown, J. C. Kemp Van Ee, Lewis A. Hilborn, H. C. Stratton, and Charles E. Ladd, as Directors of Palmer Oil Company, a Corporation, and in Their Respective and Individual Capacities, Anglo-California Trust Company, a Corporation, and Palmer Oil Company, a Corporation, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Second Division.

Received and filed May 28, 1914.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

ANDREW CLAUSS et al.,

Appellants,

vs.

PALMER UNION OIL COMPANY, a Corporation,
et al.,

Appellees.

**Order Enlarging Time [to June 8, 1914, to File
Record on Appeal, etc.].**

Good cause appearing, it is hereby ordered that the appellants may have until the 8th day of June, 1914, within which to file the record of its appeal and docket the case, and the appellant's time is hereby enlarged to that extent.

Dated May 9, 1914.

M. T. DOOLING,
Judge.

[Endorsed]: No. 2428. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to June 8, 1914, to File Record Thereof and to Docket Case. Filed May 9, 1914. F. D. Monckton, Clerk. Re-filed May 28, 1914. F. D. Monckton, Clerk.

United States Circuit Court of Appeals

For the Ninth Circuit

ANDREW CLAUSS, VICTOR ENGINGER, W. A. GRUBB, JOSEPH HAMM, K. HALTER, L. SCHOTT, L. LAIT, E. W. CLARK, JEAN A. GOURSELLE, M. C. BROOKE, H. L. BROOKE, JESSE W. OLNEY, LILLY M. STEWART, THEODORE B. WILCOX, F. L. SHULL and ALVIN J. WHITMAN,

Appellants,

vs.

PALMER UNION OIL COMPANY (a corporation), FRANK L. BROWN, LEWIS A. HILBORN, GEORGE L. WALKER, CHARLES E. LADD, GAVIN McNAB, H. C. STRATTON, and GEORGE I. STEWART, as directors of said Palmer Union Oil Company (a corporation), and in their respective and individual capacities, FRANK L. BROWN, J. C. KEMP VAN EE, LEWIS A. HILBORN, H. C. STRATTON and CHARLES E. LADD, as directors of Palmer Oil Company (a corporation), and in their respective and individual capacities, ANGLO-CALIFORNIA TRUST COMPANY (a corporation), and PALMER OIL COMPANY (a corporation),

Appellees.

Upon Appeal From the United States District Court for the Northern District of California, Second Division.

Honorable M. T. DOOLING, Judge.

Filed**BRIEF FOR APPELLANTS.**

OCT 31 1914

JOHN E. BENNETT,
JESSE OLNEY,

F. D. Monckton, *Solicitors and Counsel for Appellants.*

Clerk,

No. 2428

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ANDREW CLAUSS, VICTOR ENGINGER, W. A. GRUBB, JOSEPH HAMM, K. HALTER, L. SCHOTT, L. LAIT, E. W. CLARK, JEAN A. GOURSELLE, M. C. BROOKE, H. L. BROOKE, JESSE W. OLNEY, LILLY M. STEWART, THEODORE B. WILCOX, F. L. SHULL and ALVIN J. WHITMAN,

Appellants,

vs.

PALMER UNION OIL COMPANY (a corporation), FRANK L. BROWN, LEWIS A. HILBORN, GEORGE L. WALKER, CHARLES E. LADD, GAVIN McNAB, H. C. STRATTON, and GEORGE I. STEWART, as directors of said Palmer Union Oil Company (a corporation), and in their respective and individual capacities, FRANK L. BROWN, J. C. KEMP VAN EE, LEWIS A. HILBORN, H. C. STRATTON and CHARLES E. LADD, as directors of Palmer Oil Company (a corporation), and in their respective and individual capacities, ANGLO-CALIFORNIA TRUST COMPANY (a corporation), and PALMER OIL COMPANY (a corporation),

Appellees.

Upon Appeal From the United States District Court for the Northern District of California, Second Division.

Honorable M. T. DOOLING, Judge.

BRIEF FOR APPELLANTS.

Abstract and Statement of the Case.

The gist of this action is to set aside on the ground of fraud and conspiracy against the minority stockholders upon the part of the directors of the two defendant corporations, the transfer and *sale* by them of the *assets* of the Palmer Oil Company to their Palmer Union Oil Company for their own individual benefit and without valuable consideration to the said minority shares, which to date have received nothing whatever for a very valuable property.

The bill of complaint sets forth in detail the formation by the defendants of their Palmer Union Oil Company as a California corporation with the design of securing to it

“for their own benefit all of the property of the Palmer Oil Company and its minority holdings of stock without giving or paying anything of substantial value therefor, and thereby to deprive and defraud the Palmer Oil Company, and its minority stockholders, of all interest in that corporation” (Bill, par. II, Trans. p. 6).

The bill then proceeds to show of what the Palmer Union Oil Company so organized consisted and that its assets were of comparatively little or no value, and that these defendants who composed its entire directorate were owners of practically the entire number of shares of stock issued. That this com-

pany was capitalized at \$6,000,000 (*later increased to \$10,000,000*), but possessed assets of only \$140,000 in value at the outside, these assets consisting of wildcat lands, and that the company had no income (Bill, pars. II, III, IV, Trans. pp. 6-11).

That with this slender substance the conspiracy was formed by these defendant directors to obtain for themselves in this their Palmer Union Oil Company, the assets of Palmer Oil Company, of which they likewise composed the entire directorate and controlled a majority of the stock, and whose assets were of the value of \$2,500,000 (Bill, par. I, Trans. p. 3).

That in pursuance of this fraudulent conspiracy these defendant directors, in behalf of their Palmer Union Oil Company, entered into negotiations with themselves as directors of Palmer Oil Company for the *sale* to their Palmer Union Oil Company possessing merely nominal assets, of the assets of the Palmer Oil Company, which assets were of a value of \$2,500,000, for \$2,000,000 in bonds of the Palmer Union and \$2,000,000 in its common stock, under the direct misrepresentation made to the stockholders of Palmer Oil Company that said purchase price was to be at once distributed to the minority shares pro rata (Bill, par. V, Trans. pp. 13-17).

That in addition to the assents to this sale by the stock controlled by these defendant directors themselves they obtained by false and fraudulent representations to the minority shareholders of the

Palmer Oil Company enough further assents to make two-thirds, or which they claimed to be two-thirds, of such issued stock (Bill, par. V, pp. 13, 14, 15, 16, 17; par. VI, p. 18). That thereupon the total assets of the Palmer Oil Company passed into the possession of the Palmer Union Oil Company and of these defendants. That said transfer was an outrage and imposition upon the interests of the minority stockholders of the Palmer Oil Company, and was made in fraud of such stockholders and their proportional interest therein. That said transfer and sale was of great benefit to these defendants and their Palmer Union Oil Company, but was destructive of the interests of the stockholders of the Palmer Oil Company (Bill, par. VII, Trans. pp. 18, 19).

That thereafter the said purchase price, consisting of the said Palmer Union bonds and stock, were transferred by these defendant directors of the one corporation to themselves as directors of the other corporation, *but never distributed to the minority shares*. That later on these defendant directors, as virtual owners and in control of the Palmer Union Oil Company, caused its capital to be increased to \$10,000,000 (Bill, par. VIII, Trans. pp. 20-24), later designating \$4,000,000 of this as preferred shares.

That thereupon these defendant directors, through the fraudulent voting of certificates of stock of the Palmer Oil Company fraudulently obtained by them, and without the knowledge and without notice to the minority shareholders, caused a meeting to be

held of Palmer Oil Company and authorized themselves as its directors to take out of the treasury of the Palmer Oil Company (the seller) and to return to themselves as directors of their Palmer Union Oil Company (the buyer) the said \$2,000,000 in bonds (the purchase price), and actually did so denude the Palmer Oil Company treasury in fraud of its minority shares of these bonds which had now become the only asset of the company. That thereafter these bonds were cancelled by these directors for and on behalf of the Palmer Union Oil Company; by which transaction these defendants had obtained for their interests in the Palmer Union Oil Company and for their company the entire assets of the Palmer Oil Company, *for nothing*.

That this result was obtained by the pretended exchange between these defendants acting as the directors of both corporations of these 6% first mortgage gold bonds of the Palmer Union Oil Company in the Palmer Oil treasury for Palmer Union assessable preferred stock on a dollar for dollar basis.

“That the transaction was a further fraud upon the said Palmer Oil Company, and a part and process of the scheme of said conspirators to contrive, by successive steps, to deprive said minority stockholders of all interest whatever in their Palmer Oil Company properties” (Bill, par. VIII, Trans. p. 23).

That in fact there was not even any transfer of preferred stock back to the Palmer Oil Company in exchange for those Palmer Union bonds, but that thereafter these defendants, as directors of Palmer

Union Oil Company, fraudulently caused requests to issue to the minority stockholders of the Palmer Oil Company to come to them and deliver up their Palmer Oil Company certificates of shares (which represented their rights to the bonds) and receive a share of Palmer Union preferred and one share of Palmer Union common (both assessable) stock therefor. These directors meanwhile and those they controlled had so exchanged all their own Palmer Oil Company shares into further Palmer Union Oil Company shares; thus by adding the one to the other obtaining the full and complete benefit to themselves as individuals of the fraud accomplished. That by this means they procured large quantities of Palmer Oil Company stock, enough to constitute two-thirds of the stock issued (Bill, par. IX, Trans. p. 24).

That thereupon, in an attempt to place the various frauds beyond attack, these confederates, without notice to the minority shares, disincorporated the Palmer Oil Company by causing, unknown to the minority, amended articles of incorporation to be filed with the Secretary of State of California reducing the term of its existence from 50 years to 6 years, 6 months and 4 days, whereby they sought to have the Palmer Oil Company expire by limitation within 6 days after the passage of their resolution, and within 2 days after its filing with the Secretary of State (Bill, par. IX, Trans. p. 25).

That the only name of a stockholder of Palmer Oil Company designated as voting was Palmer Union Oil Company as owning 1,341,106 shares, and

upon that vote alone the pretended amended articles were passed.

That the said stock so pretended to assent and vote upon the amendment of the articles of incorporation was not in fact, nor in law, nor in equity owned by the Palmer Union Oil Company either by proxy or otherwise, and had been fraudulently procured from the stockholders of the Palmer Oil Company (Bill, par. IX, Trans. p. 26).

That these defendants now claim the Palmer Oil Company, by reason of the fraudulent voting of its stock by the Palmer Union Oil Company, the party directly benefited, to be out of existence, and its total assets to be vested in themselves through their Palmer Union Oil Company.

That large numbers of Palmer Oil stockholders failed and refused to deliver up their original certificates of Palmer Oil Company stock to the Palmer Union Oil Company in exchange for its assessable shares. To force such to part with their certificates of Palmer Oil Company, and to compel them to become stockholders in Palmer Union, thus waiving all rights to obtain redress from the said fraudulent sale and transfer, these defendants, as directors of Palmer Union Oil Company, thereupon wrongfully and fraudulently arbitrarily placed the names of the non-assenting minority shareholders of the Palmer Oil Company who still retained their original stock certificates, upon the stock books of their Palmer Union Oil Company as holders of preferred

and common shares in said company, and then arbitrarily assessed these shares, threatening and notifying them that unless they delivered up their original Palmer Oil stock certificates and paid the assessment on the Palmer Union stock certificates so arbitrarily allotted to them upon the Palmer Union stock books that their stock would be sold as delinquent and they foreclosed of all right or interest in both corporations, upon the hypothesis that the Palmer Oil Company was now defunct and out of existence. That thereupon and in accordance with such fraudulent scheme the different amounts of stock so fraudulently and wrongfully arbitrarily placed upon the stock books of the Palmer Union Oil Company, as belonging to these non-assenting Palmer Oil Company minority shares, were declared delinquent (Bill, par. XII, Trans. p. 29), and sold out and taken over by the Palmer Union Oil Company, and its capitalization thereby so much reduced and the holdings of these defendant directors therein thereby so much enhanced. Whereby the majority and directors of the Palmer Oil Company thus obtained for nothing, to their own personal benefit, the property of the minority without consideration through a direct conspiracy to defraud.

The amended bill alleges that the complainant "was, and has been, and now is" the holder of his original certificate of shares of stock at all times mentioned in the bill since prior to the time of the fraudulent sale and transfer of assets which the bill attacks and never consented to any of the fraud-

ulent acts therein named; and it contains the various averments necessary under the new equity rules and practice.

The ultimate relief sought by the amended bill is that the transfer and sale by which the entire assets of the Palmer Oil Company were so conveyed to the Palmer Union Oil Company be declared null and void and of no effect, and that a decree be entered directing their return, and for general relief.

The original bill was filed October 7, 1913.

The defendants Palmer Union Oil Company and Lewis A. Hilborn thereupon filed answers to the merits without objecting to the jurisdiction of the Court over their persons, on October 28, 1913.

Motions to dismiss the original bill were later filed on behalf of the various defendants on November 8, 1913.

Complainant filed his amended bill November 15, 1913.

All the defendants thereupon filed motions to dismiss the amended bill on November 25, 1913.

An order was entered taking the amended bill pro confesso against Palmer Union Oil Company, and Lewis A. Hilborn, who had answered the original bill, and against Palmer Oil Company, which never at any time has appeared in the suit, and the other defendants, January 19, 1914.

The various defendants then, excepting Palmer Oil Company, filed motions to vacate the order tak-

ing the amended bill pro confesso, January 21, 1914.

Upon the hearing of these motions the Court vacated its order taking the amended bill pro confesso against all the defendants, and of its own motion against Palmer Oil Company, January 26, 1914.

Later the Court filed an opinion granting the motions of the various defendants to dismiss the amended bill, and an order was summarily entered thereon "*dismissing the suit*" March 2, 1914.

Thereupon a final decree was entered without notice to the complainant or his counsel of the Court's said order of March 2, 1914, dismissing the amended bill of complaint, March 4, 1914.

Thereupon complainant filed his motion asking leave of the Court to amend his bill to conform to the Court's opinion, March 10, 1914.

Thereupon the Court filed its opinion and entered its order denying complainant leave to amend April 3, 1914.

Specification of Errors Relied Upon.

FIRST.

The Court erred in granting (Trans. p. 68) the motions of defendants Palmer Union Oil Company and Lewis A. Hilborn to vacate the order pro confesso taken against them; for the reason that they

had both answered to the merits the original bill on October 28, 1913, and thereafter complainant had filed an amended bill on November 15, 1913, and said defendants had not answered said amended bill within ten days, or at all, as required by New Equity Rule 32, and such order was properly entered.

The Court also, beyond this fact, erred as said defendants made no showing whatever of any kind to be relieved from said default. There was no showing, or evidence, or record before the Court save an affidavit of merits, separately filed, made by Gavin McNab (Trans. p. 67), one of the defendants, which, if of any value at all (which it was not), was of value as to himself alone, and could not be availed of by any other or others of said defendants.

It was error for the Court, arbitrarily and without a showing of any kind of mistake, inadvertence, surprise or excusable neglect, or otherwise, or proposed defense upon the merits, to relieve these defendants from the consequences of their own acts under the rule.

SECOND.

There was no motion made on behalf of Palmer Oil Company, defendant, to be relieved from said order pro confesso. It had not appeared in any manner in the suit; service had been regularly had upon it; the time had run against it; and the Court should not of its own motion have vacated the order pro confesso taken and entered against it, and the vacating of said order was error.

THIRD.

The Court erred in granting the motion of Palmer Union Oil Company and the several defendants to dismiss the amended bill of complaint, and in its opinion, order, and final decree thereon:

In its opinion (Trans. p. 69) granting the motion, the Court held that:

“1. The Court has jurisdiction of the subject matter.”

“7. The facts set forth are sufficient to constitute a valid cause of action in equity.”

But nevertheless held:

“2. That the Palmer Senior Oil Company and the bondholders of the Palmer Union Oil Company are necessary parties”;

“5. That there is a misjoinder of causes of action in that the bill seeks to set aside a transfer, and seeks also to recover from the directors the value of the property transferred”;

“6. That there is a misjoinder of causes of action in that the bill seeks to set aside a transfer, and seeks also to recover the consideration for such transfer from the transferee”;

“8. That by reason of the non-joinder of necessary parties, and the misjoinder of causes of action the bill should be dismissed. The motion to dismiss is, therefore, granted.”

The appellants cite said paragraphs 2, 5, 6 and 8 of the opinion as error, as they are the basis of the Court order of March 2, 1914, and the final decree of March 4, 1914, the making and entry of which the appellants also cite as error.

Taking up these paragraphs seriatim we cite each as error, as follows:

Paragraph "2". The Court holds the Palmer Senior Oil Company and the bondholders of the Palmer Union Oil Company to be "*necessary*" parties. It does not hold these to be "*indispensable*" parties. Accordingly the Court could have proceeded with the case and entered its decree without prejudice to the rights of these absent parties, or brought them in of its own motion. Their omission, therefore, could hardly be held sufficient to justify the dismissal without leave or opportunity to amend upon so slight a technical interpretation considering the very grave and detailed allegations of such a bill in equity.

Aside from the fact that the Palmer Senior Oil Company was defunct; a fact known to these defendants as they themselves had disincorporated it some years ago, its trustees, if really a "*necessary*" party, were before the Court in the persons of these defendants themselves; and the bondholders of Palmer Union Oil Company were represented in the suit by the defendant Anglo-California Trust Company, the trustee named in the bond issue. These facts were called to the attention of the Court in the argument of counsel upon the motion, and as permission was then asked that amendment be made if it should appear to the Court that any of the grounds of defendants' motion were well taken, a mere oral order from the bench would have been

sufficient to have extended to these parties already in Court the added capacities in which it would be disclosed they might properly be sued.

The errors of the remaining paragraphs of the opinion 5, 6, and 8 are caused by the Court's misinterpretation of the prayers for relief, treating the prayers as an integral part of the bill. Such prayers are purely a matter of form and could not even be reached by demurrer under the old practice nor motion under the new, and the defendants have nothing whatever to do with the form of the relief demanded. If the complainant was entitled to relief in any of the modes prayed for the motions of these defendants to dismiss could not be entertained. That the complainant was so entitled to relief is settled by the Court's own opinion itself in its paragraphs 1 and 7, holding that the Court had jurisdiction and that the bill stated a valid cause of action in equity.

FOURTH.

The Court erred in its order of March 2, 1914 (Trans. p. 71), entered upon the opinion, directing "That this *suit* be and the same is hereby dismissed".

It should have given complainant an opportunity to amend in accordance with its opinion, and if he did not do so *then*, that the suit be dismissed *without prejudice*.

FIFTH.

The Court erred in entering its final decree (Trans. p. 72) dismissing the bill two days later, on

March 4, 1914, without notice to the complainant or either of his counsel of the order of March 2, 1914.

SIXTH.

The Court erred in denying (Trans. p. 81) the motion interposed by the complainant to amend the said order of the Court of March 2, 1914, and to vacate and set aside said decree of March 4, 1914, and for leave to amend to conform to the Court's opinion; and that the Court erred in making and entering its order to that effect on April 3, 1914.

In this the Court erred as its denial to complainant of leave to amend was a clear abuse of discretion in an equity cause where the allegations were of so grave and minute a character as the case at bar, and which allegations, moreover, had been held to state a valid cause of action in equity by the Court's own opinion. The amendments proffered were simply the omitting of the prayers to which the Court took exception. They set forth no new cause of action, but instead simplified the issues in a large degree. The Court's entry of its order denying leave to amend was clearly error.

The Court erred in its opinion filed upon which (Trans. p. 79) the order was entered, in that it embraced the erroneous view that in a class suit, brought on behalf of the complainant and all other persons similarly situated, and for the use and benefit of the corporation, and where the Court had originally assumed jurisdiction and later by its

opinion held that it had jurisdiction, that the citizenship of subsequent intervenors ousted that jurisdiction. The citizenship of the parties thus brought in could not divest the Court of jurisdiction in the main suit, and the Court's opinion to the contrary and its order thereon was error.

ARGUMENT.

ORDER VACATING THE ORDER PRO CONFESSO.

THE COURT'S ORDER VACATING THE ORDER PRO CONFESSO TAKEN AGAINST PALMER UNION OIL COMPANY, LEWIS A. HILBORN, AND PALMER OIL COMPANY, WAS CLEARLY ERROR, NO SHOWING WHATEVER HAVING BEEN MADE BY THESE DEFENDANTS FOR RELIEF.

The defendants Palmer Union Oil Company and Lewis A. Hilborn answered the original bill to the merits on October 28, 1913 (Trans. p. 93). They did not move to dismiss the original bill until November 8th following (Trans. p. 84). They thus having answered, it was imperative upon them, under New Equity Rule 32, upon the filing of the amended bill November 15, 1913, to file their answer within ten days, unless their time to *answer* should be extended by order of Court. No such order was obtained nor have they at any time answered the amended bill. Instead, upon November 25, 1913, they filed *motions* to dismiss (Trans. p. 94). These they

had a right to file, if they so chose, but to “*answer the amended bill within ten days*” was obligatory and imperative upon them, as the rule is unqualified.

New Equity Rule 32.

No showing was made whatever upon the motion by these defendants Palmer Union Oil Company and Lewis A. Hilborn. An independent, seemingly detached affidavit of merits by Gavin McNab was filed (Trans. p. 67). This, however, was insufficient for any purpose. By reason of these defendants having failed in compliance with the rule to file their answer within the required time, the order pro confesso was taken against them. Then they come forward with a motion to set aside the order pro confesso, and still they do not present their answer, although the law requires that in order to support their motion they must present the answer or a statement of defense upon merits. Plaintiff objects that defendants’ showing is insufficient, but the Court vacates the order pro confesso without requiring an answer, so the defendants profit by disobeying the rule, for they never did file their answer.

In *Schofield v. Horse Springs Cattle Co.*, 65 Fed. 433, the defendant’s affidavit to open default was accompanied by a like affidavit of his counsel, neither of which contained a sufficiently definite statement of the proposed defense. The Court said:

“While in some states there has been a practice which considers such advice of counsel, when the case has been fully stated to him, as

entitled to be considered by the Court in lieu of an affidavit stating the facts which show a defense to the complaint on the merits, I find that this has been a rule of practice which has been applied to law cases and not to cases in equity; that in equity, as a rule, such affidavits are not allowed, but an affidavit stating the facts constituting the defense, at least, must be presented."

The affidavits must show a meritorious defense.

To entitle a defendant to be relieved from an order or decree pro confesso, he must show a meritorious defense.

Ozark Land Co. v. Leonard, 24 Fed. 660.

It is even held that where a defendant seeks to set aside an order or decree pro confesso and litigate the case upon the merits, his proposed answer should be exhibited in connection with his application.

5 Enc. Pl. & Pr. 1024.

A decree will not be opened in order to allow the defendant to set up any defense except by answer.

5 Enc. Pl. & Pr. 1018.

Failure to answer amended bill gives right to a decree pro confesso to the whole amended bill, and not only to the amendment.

5 Enc. Pl. & Pr. 981, and notes.

A decree against several defendants opened on the application of one of them, stands in full force against the others.

5 Enc. Pl. & Pr. 1027, citing

Mansfield v. Hoagland, 46 Ill. 359.

THE AMENDED BILL STATES A VALID CAUSE OF ACTION IN
EQUITY.

The principles upon which this suit is based in equity are most ably and succinctly summed up in

Kelly v. Fahrney, 145 Ill. App. 80,
from which we quote verbatim. The Court, by Mr. Justice Chrytaus, says:

“That the officers and directors of a private corporation are in a fiduciary relation to the corporation and to the stockholders is elementary. Their duty under the principles of equity is to serve their trust beneficiaries honestly, faithfully, and without negligence. They may not avail themselves of their position for their own gain, profit, or advantage when to do so involves negligence of duty, loss of their service, or other loss, injury, detriment or disadvantage to the beneficiaries of their trust. It is fundamental in the law of corporations that the majority of the stockholders shall control the policy of the corporation and regulate and govern the lawful exercise of its powers and conduct of its business.

“But as between one stockholder and another there is also a fiduciary relation and a duty to act honestly and in good faith, so far as the exercise of their powers *within the corporation* is concerned. In the common enterprise they may not form combinations among themselves to crush the pecuniarily weaker by the force of overwhelming financial power. Through the community of interest a relation has arisen and exists, affording opportunities of wrongdoing that otherwise could not exist. A majority combination may protect its own financial interests, but it may not exercise its powers for its own sole benefit at the expense of the minority nor designedly so conduct the corporation affairs

as immediately or ultimately pecuniarily to benefit some stockholders at the unequal, and, therefore, unfair and inequitable pecuniary loss on the part of others. Equity will not tolerate a majority combination in a joint financial undertaking to perpetrate a wrong and injustice upon the minority, when the combination is made possible merely by the nature of the relation. There is in such joint financial venture a limited fiduciary relation between the parties thereto.

“The principles above referred to have been announced frequently and under various circumstances. Citing cases:

“In *Ervin v. Oregon Ry. & Nav. Co.*, 27 Fed. Rep. 625, 630, there was a controversy where a majority combination exercised its powers wholly according to the process of law, and yet a Court of Equity intervened to prevent injustice to the minority. Speaking of the majority who are defendants, the Court said:

“‘Plainly, the defendants have assumed to exercise a power belonging to the majority, in order to secure personal profit for themselves, without regard to the interest of the minority. They repudiate the suggestion of fraud, and plant themselves upon their right as a majority to control the corporate interests according to their discretion. They err if they suppose that a Court of Equity will tolerate a discretion which does not consult the interests of the minority.’

“And at page 631 the Court quotes Justice Blackburn, in *Taylor v. Chichester Ry. Co.*, L. R. 2 Exch. 379:

“‘As the shareholders are, in substance, partners in a trading corporation, the management of which is entrusted to the body corporate, a trust is, by implication, created in favor of the shareholders that the corporation will manage the corporate affairs, and apply the

corporate funds, for the purpose of carrying out the original speculation.'

"And then continues:

" 'When a number of stockholders combine to constitute themselves a majority in order to control the corporation as they see fit, they become for all practical purposes the corporation itself, and assume the trust relation occupied by the corporation towards its stockholders. Although stockholders are not partners, nor strictly tenants in common, they are the beneficial joint owners of the corporate property, having an interest and power of legal control in exact proportion to their respective amount of stock. The corporation itself holds its property as a trust fund for the stockholders who have a joint interest in all its property and effects, and the relation between it and its several members is, for all practical purposes, that of trustee and cestui que trust. *Peabody v. Flint*, 6 Allen 52, 56; *Hardy v. Metropolitan Land Co.*, L. R. 7 Ch. 427; *Stevens v. Rutland R. Co.*, 29 Vt. 550. When several persons have a common interest in property, equity will not allow one to appropriate it exclusively to himself, or to impair its value to the others. Community of interest involves mutual obligation. Persons occupying this relation towards each other are under an obligation to make the property or fund productive of the most that can be obtained from it for all who are interested in it; and those who seek to make a profit out of it at the expense of those whose rights in it are the same as their own are unfaithful to the relation they have assumed, and are guilty, at least, of constructive fraud. *Jackson v. Lude-ling*, 21 Wall. 616, 622; *Story Eq.*, Sec. 323.'

"We concur in these expressions as being equitable principles controlling stockholders in the exercise of their powers, as such *within* the corporation."

Judged by these, or any other principles in equity, the amended bill unqualifiedly states a valid cause of action.

**THE DEFENDANTS' MOTION TO DISMISS THE AMENDED BILL
AND THE COURT'S ORDER AND DECREE THEREIN.**

**THE AMENDED BILL OF COMPLAINT IS IN ALL RESPECTS
SUFFICIENT IN EQUITY AGAINST THE MOTION OF DE-
FENDANT PALMER UNION OIL COMPANY, AND OTHER
DEFENDANTS, TO DISMISS THE SAME.**

The arbitrary dismissal of the bill without leave to amend or without prejudice was based, as stated from the bench orally by the Court, upon the different divergent *prayers for relief*, and not upon the body or allegations of the bill, which the Court, in its filed opinion, held to state a cause of action.

These various objections to the prayers are found in paragraphs V, VIII, IX, X, XII of defendant Palmer Union Oil Company's motion to dismiss (Trans. p. 45).

The bill does not state two or more inconsistent statements of facts, and then ask relief in the alternative. It simply states the facts and asks relief according to the conclusion of law that the Court may draw from them, so that if one kind of relief sought be denied, another may be granted. The Court below became confused not by the allegations of the bill itself, but by the various added prayers for relief

which in no way, strictly speaking, constituted a part of the bill itself, and to which no motion could be directed; for if any part of the relief prayed for was proper, the defendant's motions must be overruled, as the relief granted could only be determined on final hearing.

Town of Strawberry Hill v. Chicago, M. & St.
P. Ry. Co., 41 Fed. 568.

The pleading is not assailable merely by reference to its prayers for relief. The motion must be to the body of the bill.

Where the bill does not state facts rendering it multifarious, the prayer for relief cannot make it so.

De Neufville v. N. Y. & N. Ry. Co., 81 Fed.
10;

Jones v. Missouri Edison Electric Co., 144
Fed. 765.

A glance at the head notes of the last case covers every ground of objection referred to, completely refuting each.

Jones v. Missouri Edison Electric Co. is particularly interesting in that even the capitalizations of its corporations are the same as the case at bar, \$10,000,000 and \$2,000,000, respectively, the difference, however, being that in the citation the question was as to a consolidation, while in the case at bar the transfer between the two companies was an out and out *sale*, and not a consolidation, the selling company remaining intact as a corporate entity. The

appellants place themselves squarely upon the authority of this case.

The prayer is only a matter of form, and where a cause of action is stated, cannot be reached by demurrer.

Enc. Pl. & Pr., vol. XVI, p. 776 and p. 793,
citing

Althof v. Conheim, 38 Cal. 230.

Where a party mistakes the form of his prayer for relief, and frames it inappropriately or inartificially, the Court may disregard trifling irregularities or mistakes, or treat the unnecessary request as surplusage, and grant such relief as will conform to the general form of the complaint, especially if it contains a general prayer for relief. Defects in the prayer of the character referred to will not be deemed jurisdictional.

Enc. Pl. & Pr., vol. XVI, p. 285;

Jones v. Van Doren, 130 U. S. 684.

As to the 7th prayer of the bill (Trans. p. 37), for a money judgment *for the benefit of the wronged corporation*, and which somewhat troubled the Court below, we simply call the Court's attention to no better or authoritative statement of the rule than the case of

Clews v. Jamieson, 182 U. S. 480,

where the Court says:

“It often happens that the final relief to be obtained by the cestui que trust consists of the recovery of money. This remedy the Court of

equity will always decree, when necessary, whether it is confined to the payment of a single specific sum, or involves an accounting by the trustee for all that he has done in pursuance of the trust and a distribution of the trust monies among all the beneficiaries who are entitled to share therein."

The foregoing is quoted in a very able opinion by Mr. Justice Quarles, who sums up the law most admirably in

Olmsted v. City of Superior, 155 Fed. 180, 181,

as follows:

"Certain it is, however, that if a good, equitable cause of action has been stated in the bill, no error of judgment on the part of the pleader, either in giving undue prominence to a mere subordinate remedy or in framing a prayer which confuses legal distinctions, will prove fatal on demurrer. No such erroneous legal conclusions will conclude the Court or render the bill multifarious. (Citing *De Neufville v. N. Y. Ry. Co.*, 81 Fed. 10; *Brown v. Guarantee Trust Co.*, 128 U. S. 412; *Lehigh Zinc & Iron Co. v. N. J. Z. & I. Co.*, 43 Fed. 548.)"

The foregoing dispose of paragraphs V, VIII, IX, X, XII of the motion of Palmer Union Oil Company to dismiss the amended bill, with which the motions of the other defendants are similar.

We will, however, briefly take up the remaining paragraphs of this motion, and in so doing it should be remarked that the foregoing were the grounds upon which the Court, by its memorandum opinion,

either denied or sustained the motion. Following, we advert to those grounds of the motion which the Court ignored in its opinion and so rejected. We, of course, have no exception to the Court's ruling on these, but since we understand this appeal would call before this Court all the grounds of defendants' motion, we now consider those features which the Court refused to notice.

Paragraph I (Trans. p. 43).

(a) That the amount in controversy does not exceed \$3000.

It is elementary that the stockholder in such a suit as this, does not proceed *in his own right*, but on behalf of the corporation, which is the "essential party in interest". The corporation is the real *actor*.

In the case of *Appleton v. American Malting Co.*, 65 New Jersey Eq. Repts. 377, 378, the true relation of a minority stockholder suit is thus explained:

"The statement that a majority of the board of directors were, and are, among the persons against whom relief is sought by the bill, discloses a situation which relieved the complainants from the duty of applying to them to bring suit in the name of the corporation. It is settled that such application need not be made when the interest, or bias, of the directors, makes it certain that if it was made, it would be denied; or, if granted, that the litigation following would necessarily be under the direction of persons opposed to its success.

“The complainants do not bring the suit to establish a right of their own, or because they are personally entitled to the relief sought. They are permitted to sue *ex necessitate rei*, because the interests of those in control of the corporation are hostile to those of the corporation itself. Although, on the record, the corporation is a party defendant, yet, in reality, the complainant represents it. Except in name, the suit is an action brought by the corporation; it is maintained solely for its benefit, and the final relief, when obtained, belongs to it and not to the complainant.”

Such averments are fully set forth in Paragraph XV of the amended bill (Trans. p. 34).

The amount in controversy, being the total value of the assets transferred and sought to be recovered from the defendants, is \$2,500,000 (Bill, par. I, Trans. p. 5).

“The sum or value of the matter in dispute which conditions the jurisdiction of a Federal Circuit Court is the amount or value of that which the complainant claims to recover or the amount or value of that which the defendant will lose if the complainant obtains the recovery he seeks.”

Cowell v. City Water Supply Co., 121 Fed. 53.

In stockholder's bills it is the amount of threatened loss by corporation, or value of assets, etc., “not the value of the plaintiff's stock”, which determines jurisdiction.

1 Fost. Fed. Pr., 5 Ed., sec. 16, p. 42.

“The bill alleges that this suit is brought by the complainants in behalf of themselves and all other owners of landholders’ shares who are similarly situated, seeking, among other things, to protect the interest of the lands of the defendant corporation as against a proposed sale of such lands. ‘Where a suit is brought by one or more for themselves, and all others of a class jointly interested for the relief of the whole class, the aggregate interest of the whole class constitutes the matter in dispute.’ (Citing Fost. Fed. Pr., 4 Ed., Sec. 16 K, page 107, and cases cited.)”

Haywood v. McDonald, 192 Fed. 892.

Also,

Carpenter v. Knollwood, 198 Fed. 298.

(b) That the suit is of a local nature, being brought in the wrong district.

(This point was not raised by defendant’s counsel upon the oral argument, and may, therefore, be deemed abandoned.)

Appellants, however, call the Court’s attention to the fact that this is a suit *in personam* to compel the reconveyance of real and personal property and assets; in other words, it is an action founded upon a trust relation (the majority as trustees for the minority) as to real and personal property and assets (cash on hand and in bank, bills receivable, contracts for the delivery of oil, oil in storage, etc.), and in the nature of conversion, and is plainly, therefore, transitory and not local, affording purely a personal remedy. It was brought in the Northern

District of California where nearly all the defendants resided, and where the Palmer Union Oil Company could be sued jointly with the others.

The Court having jurisdiction of the parties, and the action being in equity, it is of no consequence where the land lies, the Court acts in personam.

Memphis Savings Bank v. Houchens, 115 Fed. 96.

“A decree to convey land lying in another state does not affect the title; it only operates upon the person who is to make the conveyance, and it is his act in making the deed that affects the title.”

Smith v. Davis, 90 Cal. 25; cited with approval in

Peninsular etc. Co. v. Pacific S. W. Co., 123 Cal. 689.

The objection to jurisdiction raised by the defendant Palmer Union Oil Company (and by all the defendants except the trust company) in these motions to dismiss the amended bill is that:

“The Court has no jurisdiction of the *subject matter* of the action.”

Neither in the return of Palmer Union Oil Company to the temporary restraining order, October 11, 1913, nor in the answers of Palmer Union Oil Company and Lewis A. Hilborn to the original bill upon the merits, October 28, 1913; nor in these motions to dismiss the amended bill, have these

defendants, or each or any of them, raised a question of the jurisdiction of the Court over the *person*.

The question of venue is a personal privilege, and must be raised at the very first opportunity, or it is waived.

Trust Co. v. McGeorge, 131 U. S. 132;
Improvement Co. v. Gibney, 160 U. S. 217.

“If the citizenship of the parties is sufficient a defendant may consent to be sued anywhere he pleases and certainly jurisdiction will not be ousted because he has consented.”

Ex parte Schollenberger, 96 U. S. 369.

“No case has been cited, however, when any Federal Court has dismissed an action on the sole ground that it was brought in the wrong district, after the defendant had appeared generally, or pleaded to the merits without first objecting that the action was not brought in the district of the residence of either of the parties to the action. This objection relates not to the jurisdiction of the Court but to the personal privileges or exemption of the defendant.”

Souther Exp. Co. v. Todd, 56 Fed. 106.

Resident defendants cannot object that their co-defendant is sued out of his district.

“Where several defendants, who might be sued either separately or together, are joined in one suit, brought in the circuit court, in a district in which only a part of them are residents, the jurisdiction of the circuit court depending only on diverse citizenship, the defendants who reside only in the district where suit is brought cannot move to dismiss, on the ground of want of jurisdiction, under the act of congress

of August 13, 1888, and the non-resident defendants can only move to dismiss as to themselves, not as to the whole proceeding.”

Smith v. Atchison, T. & S. F. R. Co. et al.,
64 Fed. 1.

Hence none of these defendants could raise the objection that their co-defendant, Palmer Union Oil Company, was not sued in the Southern District,—and the Palmer Union Oil Company itself waived it by answering to the merits.

Paragraph II (Trans. p. 44).

That there is a nonjoinder of parties defendant because Palmer Senior Oil Company has not been joined as a party.

Aside from the fact that the Palmer Senior Oil Company is defunct and out of existence, having been disincorporated some years ago by these very defendants now raising the point, a fact, however, that is not revealed by the pleadings, we hardly see, even from the pleading how it is a necessary party.

The Palmer Senior sold to the Union the *option* to purchase from the trust company the lands, and for this option it was paid by the Union stock. This made the Senior a mere stockholder in the Union. It had no further relation in any way to the option or to the lands. The Senior was no more entitled to be made a party to this suit than would have been any other stockholder of the Union, and had it been so made a party, it would have been incorrectly made and its name must have been

stricken from the pleadings. If it were in existence it would simply, so far as this cause is concerned, be treated the same as any other stockholder of Palmer Union Oil Company, and if it were joined each other individual stockholder of the Union would have to be joined likewise. The Court in this instance evidently became confused by the *prayer* of the bill, and treated it, rather than the body of the bill itself, as controlling. Even, however, on this theory, the prayer itself (par. V, Trans. p. 36) does not affect the Palmer Senior Oil Company, but only the Palmer Union bonds, the trustee for which, Anglo-California Trust Company, is a party to the action.

The individual bondholders of Palmer Union can hardly be said to be necessary parties while the trustee of their bonds is before the Court and submitting to its jurisdiction.

Moreover, the Palmer Senior Oil Company could have been brought in any time as a party by the Court's own motion, and the Court could, therefore hardly be said to be warranted in arbitrarily dismissing so serious a bill upon so slight a technicality.

In the second clause of the Court's memorandum opinion dismissing the bill the Court says, "*the bondholders of Palmer Union are necessary parties*". This was a finding of the Court's own motion. The absence of these bondholders as parties was not pointed out by defendant nor made a ground for objection to the bill. The Court then holds (clause

8) “*That by reason of the non-joinder of necessary parties*” etc., “*the bill should be dismissed*”. Here we have the Court raising of its own motion an objection to the bill respecting parties and dismissing the bill without leave to amend, denying the right to amend when asked, because there were not made parties those whom the defendants themselves did not oppose the bill because not so made! Obviously this was beyond the power of the Court. The Court can of its own motion require other parties to be brought in, but it cannot dismiss the bill without leave to amend, because of its own motion it finds parties not in the bill who should be in, and who can be brought in if the plaintiff be permitted to do so. It is certainly not the law that a failure to make a party to a bill in a lengthy and involved array of facts, some person whose presence was not thought necessary by either side, but whom search and analysis of the bill by the Court discloses should have been brought in, is a fatal and incurable defect and the bill cannot be amended by adding such name; yet this is the gist of the Court’s ruling:

“A failure to make other parties owners of the chose in action parties to such a suit is a curable defect, and it will not sustain a judgment of dismissal of the bill on its merits. The bill should be retained until the complainants have reasonable opportunity to amend it and to bring in such part owners or to show in their amended bill an excuse for their ab-

sence, under the practice in equity in the Federal Courts.”

Rogers et al. v. Penobscot Mining Co. et al.,
154 Fed. 606.

Paragraph III (Trans. p. 44).

It is further urged that the creditors of Palmer Oil Company are necessary parties, and have not been joined. (This ground was denied by the Court.)

It nowhere appears in the pleading that there are any creditors. If such should be found upon the trial they could be brought in by the Court. Moreover the claim of these defendants is that the Palmer Oil Company has been successfully put out of existence by their own acts, and is now defunct.

Paragraph IV (Trans. p. 44).

The extreme technicality raised in the objection that the bill does not contain the usual caption is hardly worthy of notice as ground for dismissal of bill of so serious import. The original bill contains the proper caption of a full statement of parties plaintiff and defendant and its omission in the amended bill was an omission easily corrected.

Paragraph V (Trans. p. 44).

Raising the objection that the bill does not contain a short statement of the grounds upon which the Court's jurisdiction depends is best answered by the bill itself in its opening paragraph fully setting forth the diversity of the citizenship of the

parties. This the Court in its opinion held sufficient.

Paragraph VI (Trans. p. 44).

Raising the objection that the bill does not contain a short statement of the ultimate facts upon which the complainant asks relief is best answered by the character of the bill itself which of necessity must set forth the various steps by which the frauds complained of were accomplished. This the Court, in its opinion, held sufficient.

Paragraph VII (Trans. p. 44).

Raising the objection that the bill does not state why the creditors of Palmer Oil Company are not made parties is answered simply by the fact that it nowhere appears either by the bill itself or elsewhere that there are or ever have been any creditors of Palmer Oil Company; but in fact it appears that the defendants raising this objection claim that by their own acts the Palmer Oil Company has been disincorporated and no longer exists.

Paragraph XI (Trans. p. 45).

That the facts set forth do not constitute a cause of action in equity.

Aside from the fact we have fully covered this in the opening part of the argument, we recall the Court's attention to the very minute and definite character of the facts themselves set forth in the bill. If there ever was a bill gripping with facts constituting a cause of action, this is one.

Paragraph XIII (Trans. p. 45).

That the bill fails to comply with Equity Rule 38.

The bill itself is the best answer (Trans. p. 3, middle paragraph).

“Your orator further shows that the questions involved, and the relief demanded in this suit, are of common and general interest to many persons, to wit, to all the stockholders of said Palmer Company, constituting a class so numerous as to make it impracticable to bring them all before the Court in this suit.” (Trans. p. 3.)

Paragraph XIV (Trans. p. 46).

That the bill does not allege complainant to have been a stockholder at the time of the transaction complained of.

To this again the bill itself is the best answer (Trans. p. 2, first 8 lines; Trans. p. 33, par. XV).

“Your orator, Andrew Clauss, is a resident and citizen of the State of Ohio, and on the 1st day of October, 1911, was the owner and holder of one thousand shares of the capital stock of the defendant Palmer Oil Company, and at all times since said date has been and now is the owner and holder of said one thousand shares of said stock.” (Trans. p. 2.)

“That your orator was and has been and now is the owner and holder of said one thousand shares of the capital stock of said Palmer Oil Company at all times herein mentioned since prior to said 21st day of October, 1911; and your orator did not consent to the transfer of said assets of said Palmer Company to said

Union Company, and did not at any time consent to, and had no knowledge of the transfer by said defendant directors of said Union Company bonds belonging to said Palmer Company to said Union Company in exchange for the preferred shares of said Union Company, and did not deliver up his said Palmer Company stock to said Union Company in exchange for said preferred and common stock of said Union Company.” (Trans. p. 33.)

The amended bill of complaint is in all respects sufficient in equity against the motion of defendant Palmer Union Oil Company to dismiss the same.

In the separate motions of individual defendants other than Palmer Union Oil Company there is set up the additional ground of an alleged improper joinder of parties defendant.

This objection is raised by paragraphs I, II, III, motions of individual defendants, excepting Palmer Union Oil Company and Palmer Oil Company (Trans. pp. 52, 53).

In this connection we refer the Court to the leading case of

Brown v. Deposit Co., 128 U. S. 412,
where the Court says:

“The case against one defendant may be so entire as to be incapable of being prosecuted in several suits, and yet some other defendant may be a necessary party to some portion only of the case stated. * * * It is not indispensable that all the parties shall have an

interest in all the matters contained in the suit. It will be sufficient if each party has an interest in some material matters in the suit, and they are connected with the others."

In

Sheldon v. Packet Co., 8 Fed. 769, 770,

Mr. Justice Harlan said:

"As a general rule, the Court will not compel parties to incur the expense, vexation, and delay of several suits, where the transactions constituting the subject of the litigation, or out of which the litigation arises, are so connected by their circumstances as to render it proper and convenient that they should be examined in the same suit, and full relief given by one comprehensive decree. A different rule would often prove to be both oppressive and mischievous, and could result in no possible benefit to any litigant whose object was not simply to harass his adversary."

Later in the opinion Justice Harlan approvingly quotes from the opinion of Chancellor Kent in *Brinkerhoff v. Brown*, 6 Johns. Ch. 139, the following:

"It thus appears from the bill that all the defendants were not jointly concerned in every injurious act charged. There was a series of acts on the part of the persons concerned in the company, all produced by the same fraudulent intent, and terminating in the deception and injury of the plaintiffs. The defendants performed different parts in the same drama, but it was still one piece, the entire performance, marked by different scenes; and the question now occurs whether the several matters charged are so distinct and unconnected as to

render the joining of them in one bill a ground for demurrer. 'The principle is that a bill against several persons must relate to matters of the same nature, and having a connection with each other, and in which all the defendants are more or less concerned, though their rights in respect to the general subject of the case may be distinct.'

Unless the Court can see that hardship and injustice have resulted from the joinder of parties, a decree should not be reversed upon this ground.

Oliver v. Piatt, 44 U. S., 3 How. 333.

Applying these clearly stated principles to the pending bill, it will be seen that the amended bill is directed primarily against the sale under the contention that such sale was fraudulent and voidable. In so doing it was necessary to make recital of the various steps leading up to such sale; but all relate to the desired setting aside of the sale, and are a part of the matters in which the said sale and transfer of assets are alleged to be fraudulent and voidable by the minority shares on behalf of the corporation. In this view the charges of fraud on the part of the various defendants are not antagonistic so that all may not stand together in one bill. The same parties must be defendants therein if separate suits were instituted to avoid the sale. If convenience is to be a largely controlling test, then the convenience of the parties is served, without injury to them, by having these

matters litigated in the same suit. So also as to the matters recited which occurred after the sale. Their alleged invalidity is based on the alleged invalidity of the sale, and the parties necessary to the bill attacking the sale are so interested in the attacks on those subsequent matters as that they are not improperly made defendants as to the latter attacks. We see no good reason for the assumption that these parties are improperly joined in a suit which thus attacks the sale upon which their rights are so largely based. In other words, though all of the parties to this suit do not have the same interest in every material feature of the suit, yet each "has an interest in some material matters in the suit, and they are all connected with the others". The main recitals of the bill relate to and affect the alleged invalidity of the sale, or are dependent thereon. There is little, if any, of the evidence which may be introduced to prove the allegations of the bill, as to the invalidity of the sale and the grounds thereof, which will not concern and affect the rights of each of the parties made defendants herein. Around the alleged invalidity of the sale are grouped the rights and interests of all the parties.

The joinder in a suit by a minority stockholder to avoid a consolidation, of the majority stockholders and the directors who took an active part in creating the consolidation, does not render a bill multifarious. A bill is not multifarious which presents a common point of litigation, the decision

of which will affect the whole subject matter and settle the rights of all the parties to the suit.

Jones v. Missouri-Edison Electric Co., 144 Fed. 767.

THE COURT ERRED IN ITS ARBITRARY REFUSAL TO ALLOW COMPLAINANT TO AMEND HIS BILL TO CONFORM TO THE COURT'S FILED OPINION, AND THE ENTRY OF ITS ORDER DENYING COMPLAINANT'S MOTION TO THAT EFFECT.

The Court's arbitrary refusal to allow complainant leave to amend his bill to conform to the Court's opinion filed upon the motions dismissing the bill, was error and an abuse of discretion.

The Court's opinion filed in denying such motion was erroneous in holding that the citizenship of several intervenors being of the same state as that of the defendants ousted the jurisdiction of the Court after it had already assumed jurisdiction in the main suit (Trans. p. 80).

"Consolidations and interventions do not oust the jurisdiction of the Court in the main suit, whatever the citizenship of the parties thus brought into it may be."

Sioux City v. Trust Co., 82 Fed. 128.

"The rule is that consolidations, cross bills and interventions do not oust jurisdiction."

Lilienthal v. McCormick, 117 Fed. 96;

Ames v. Big Indian etc., 146 Fed. 181.

“Having jurisdiction of the parties and the cause, residence of intervenors is immaterial.”

Clarke v. Eureka etc., 116 Fed. 534;

Everett v. School District, 102 Fed. 529.

THE REFUSAL OF LEAVE TO AMEND WAS AN ABUSE OF DISCRETION.

The Court in *Hardin v. Boyd*, 113 U. S. 758, says:

“If the bill is found defective in its prayer for relief, or in proper parties, or in the omission or statement of fact or circumstance connected with the substance of the case, but not forming the substance itself, the amendment is usually granted. * * * The amendment offered here did not introduce new allegations, nor make additional parties, nor encumber the record, nor increase the expenses of the litigation, nor complicate the suit, nor make new issues of fact. It simply enabled the Court, upon the case made by the original bill, to give the relief which that case justified.” (Citing many cases.)

The Court below in its opinion held that the amended bill stated a valid cause of action in equity. It was confused, however, by the various prayers for relief. The complainant asked leave to amend by dismissing these prayers which confused the Court and to leave the prayer of the bill one simply to set aside the wrongful transfer of assets on

the ground of fraud. There was no question but that the bill stated a good cause of action as to this.

In

People v. Mount Shasta Co., 107 Cal. 256-258,

the Court says:

“The Court refused to allow the plaintiff to amend the complaint. This is generally a matter of absolute right, and when it is refused the Court must be able to see that the complaint cannot be so amended or to state a good cause of action. *This the Court will not often be able to do.*”

It would be a strange, harsh rule to deny a party leave to amend and to litigate his just demands after a decision, as in our case on a point in pleading.

As the Court says in

Guidery v. Green, 95 Cal. 630:

“It can rarely happen that a Court would be justified in refusing a party leave to amend his pleadings, so that he may properly present his case.”

Great liberality should be shown by a trial Court in permitting, when it can be done without working great delay, such amendments to pleadings as facilitate the production of all the facts bearing upon the questions involved in the action; and to strike out a pleading, under such conditions, is a

harsh proceeding, and should only be resorted to in extreme cases.

Burns v. Scoofy, 98 Cal. 272.

“When it was discovered that the pleadings were defective, the Court should have afforded an opportunity to amend. Such was the only way in which the real subject of dispute could be reached, tried and finally determined.”

Stringer v. Davis, 30 Cal. 322.

The foregoing decisions of the California Supreme Court are made authority in the U. S. District Court, by Rule 18 of the “Rules of Practice of the U. S. Circuit Court for the Ninth Circuit, Northern District of California”, and are respectfully submitted with this rule as to amendments to pleadings in mind.

“Grounds were stated in the demurrer which would, if sustained, be a bar to any other suit. It does not appear by the decree, or by the order sustaining the demurrer, on which of the grounds set out in the latter, it was sustained, or on what ground the bill was dismissed. As the record stands the decree might be pleaded successfully as a bar to any other bill, and to prevent what may be a great injustice, we must reverse the present decree, and remand the case, with directions to allow plaintiffs to amend their bill as they may be advised.”

House v. Mullen, 89 U. S. 42-47.

“The decree standing as it does is a decision on the merits of the case and a bar to any other suit. It should therefore be reversed.”

Goodman v. Niblack, 102 U. S. 563.

**THE DECREE OF THE DISTRICT COURT SHOULD BE REVERSED
WITH DIRECTIONS TO DENY THE MOTIONS OF DEFEND-
ANTS TO DISMISS THE AMENDED BILL.**

It is respectfully submitted this cause should be remanded to the trial Court with directions for further proceedings to be there taken, as follows:

I. To set aside its order of January 26, 1914, vacating the order pro confesso taken against Palmer Union Oil Company, Lewis A. Hilborn and Palmer Oil Company.

II. To vacate and set aside its order granting the motions of defendants to dismiss the amended bill of complaint in the order of March 2, 1914, dismissing the suit.

III. To vacate and set aside the final decree of March 4, 1914, dismissing the amended bill.

IV. To thereupon enter its order denying the various motions of said defendants to dismiss the amended bill, thereby finding the amended bill good and sufficient, with instructions to at once, upon the payment of costs to the complainant, file their answers to the amended bill.

V. If this Court shall rule against the appellants upon the foregoing, then to remand this suit to the trial Court with instructions to said Court to permit the complainant to amend his bill as he may be advised within a reasonable time, and to amend to that effect, its said order of April 3, 1914.

Dated, San Francisco,

October 31, 1914.

JOHN E. BENNETT,

JESSE OLNEY,

Solicitors and Counsel for Appellants.

United States Circuit Court of Appeals

For the Ninth Circuit

9

ANDREW CLAUSS, VICTOR ENGINGER, W. A. GRUBB, JOSEPH HAMM, K. HALTER, L. SCHOTT, L. LAIT, E. W. CLARK, JEAN A. GOURSELLE, M. C. BROOKE, H. L. BROOKE, JESSE W. OLNEY, LILLY M. STEWART, THEODORE B. WILCOX, F. L. SHULL and ALVIN J. WHITMAN,

Appellants,

vs.

PALMER UNION OIL COMPANY (a corporation), FRANK L. BROWN, LEWIS A. HILBORN, GEORGE L. WALKER, CHARLES E. LADD, GAVIN McNAB, H. C. STRATTON, and GEORGE I. STEWART, as directors of said Palmer Union Oil Company (a corporation), and in their respective and individual capacities, FRANK L. BROWN, J. C. KEMP VAN EE, LEWIS A. HILBORN, H. C. STRATTON and CHARLES E. LADD, as directors of Palmer Oil Company (a corporation), and in their respective and individual capacities, ANGLO-CALIFORNIA TRUST COMPANY (a corporation), and PALMER OIL COMPANY (a corporation),

*Appellees.***BRIEF FOR APPELLEES.**

GAVIN McNAB,
B. M. AIKINS,
R. P. HENSHALL,
ROBERT R. MOODY,
NAT SCHMULOWITZ,

Solicitors for Appellees.

LUTHER ELKINS,

Solicitor for Appellees, George I. Stewart and Gavin McNab.

GAVIN McNAB,

*Solicitor for Appellee, Anglo-California Trust Company.**Filed this.....day of November, 1914.**FRANK D. MONCKTON, Clerk.**By**Deputy Clerk*

Filed

NOV 9 1914

F. D. MONCKTON

United States Circuit Court of Appeals

For the Ninth Circuit

ANDREW CLAUSS, VICTOR ENGINGER, W. A. GRUBB, JOSEPH HAMM, K. HALTER, L. SCHOTT, L. LAIT, E. W. CLARK, JEAN A. GOURSELLE, M. C. BROOKE, H. L. BROOKE, JESSE W. OLNEY, LILLY M. STEWART, THEODORE B. WILCOX, F. L. SHULL and ALVIN J. WHITMAN,

Appellants,

VS.

PALMER UNION OIL COMPANY (a corporation), FRANK L. BROWN, LEWIS A. HILBORN, GEORGE L. WALKER, CHARLES E. LADD, GAVIN McNAB, H. C. STRATTON, and GEORGE I. STEWART, as directors of said Palmer Union Oil Company (a corporation), and in their respective and individual capacities, FRANK L. BROWN, J. C. KEMP VAN EE, LEWIS A. HILBORN, H. C. STRATTON and CHARLES E. LADD, as directors of Palmer Oil Company (a corporation), and in their respective and individual capacities, ANGLO-CALIFORNIA TRUST COMPANY (a corporation), and PALMER OIL COMPANY (a corporation),

Appellees.

BRIEF FOR APPELLEES.

Statement of the Case.

This is an appeal from a final decree dismissing a suit brought by Andrew Clauss against the Pal-

mer Union Oil Company, the directors of that company; and other parties. The suit was brought by Clauss, claiming to be a stockholder of the Palmer Union Oil Company, and the relief sought by the original bill of complaint was, in part, as follows: It sought to recover back from the Palmer Union Oil Company the physical assets which it alleged had been transferred by the Palmer Oil Company to the Palmer Union Oil Company; and it prayed an injunction, pending the determination of this question, restraining the collection of an assessment upon the capital stock of the Palmer Union Oil Company. The original bill is not in the record. The amended bill, upon which the decree appealed from was entered, further seeks relief by way of accounting, and also seeks to recover from the directors of the Palmer Union Oil Company, the value of the property transferred, as well as the consideration for such transfer from the transferee. To this bill, a motion to dismiss on the part of all the defendants, some of them appearing separately, was made. These motions were granted, and in accordance with the Court's order, a final decree dismissing the bill was entered.

A somewhat detailed statement of the proceedings in the Court below is necessary to understand the points arising on this appeal.

The original bill was filed on October 7, 1913 (p. 93), and on October 8th (*id.*), the Court entered

an order to show cause why a temporary restraining order should not issue pending the suit, returnable on October 11th. The purpose of this order to show cause was to secure a temporary injunction restraining the collection of the assessment just referred to upon the capital stock of the Palmer Union Oil Company. In response to this order to show cause, it was pointed out that the main object of the bill was to set aside the transfer of *property* from the Palmer Oil Company to the Palmer Union Oil Company, made in consideration of an issue of stock, and that in consequence, the plaintiff could have no standing to complain of an assessment upon the stock of the Palmer Union Oil Company *if he won the suit*. In other words, only upon the theory that plaintiff lost his case, could he be entitled to an injunction. Accordingly, the order to show cause was denied (p. id.).

On November 7, 1913 (p. 94), before any of the defendants had defended in the case, Victor Enginger and fourteen other persons claiming to be stockholders of the Palmer Union Oil Company, filed petitions to intervene, and their interventions were granted (p. 94). The great majority of these interveners were citizens of the State of California (see p. 80), and the Court could have no jurisdiction over their bills, *which are identical with the plaintiff's bill*, as original bills. The petitions to intervene and the bills in intervention are not found in the record.

On November 8, 1913 (p. 4), the defendants, some of them appearing separately, filed motions to dismiss the bill. On the 15th of November, 1913, before any of these motions had been heard, the plaintiff obtained leave to file an amended bill (*id.*), and such an amended bill was filed, which is found in the record (pp. 1 et seq.).

On November 25, 1913 (p. 94), in response to the service of this amended bill, the defendants, some of them appearing separately, filed their several motions to dismiss the bill. On January 19, 1914, *the clerk* entered an order taking the amended bill *pro confesso* as to all the defendants (see p. 58). This order was entered notwithstanding the fact that defendants had filed their motions to dismiss the amended bill as required by the rules (see pp. 43 et seq.), and before any hearing or determination on this motion had been had.

On January 24, 1914 (pp. 60 et seq.), the defendants, separately appearing, filed an application to vacate and set aside the order purporting to take the amended bill *pro confesso*. The principal ground of this motion was that they had appeared in response to the service of the amended bill by motion to dismiss. The application was heard on January 26, 1914, and was promptly granted (p. 69). On January 29, 1914, the motions to dismiss, themselves, came on for hearing before the Court, and were argued and submitted. On March 2, 1914 (p. 71), the Court granted these motions

to dismiss, pursuant to an opinion which is found in the record (p. 69). On March 4, 1914 (p. 72), a final decree dismissing the bill in accordance with the opinion of the Court, was entered.

On March 10, 1914 (p. 73), after the record had been enrolled, the plaintiff filed a motion to amend the order granting the motion to dismiss, and seeking to vacate the final decree entered pursuant thereto (p. 73). On April 3, 1914 (p. 81), this motion was denied in an opinion, which is likewise found in the record (p. 79).

See,

Clauss v. Palmer Union Oil Co., 213 Fed.
286.

It will thus be seen that this cause was heard on four separate occasions in the Court below. First, on an application for a temporary injunction pending the action; secondly, on an application to vacate a *pro confesso* order upon the ground that the parties were not in default; thirdly, on a motion to dismiss the bill; and, fourthly, on a motion to vacate and set aside the decree dismissing the bill.

Other facts necessary to an understanding of the case, including a statement of the substance of the bill, will be stated as we proceed with the argument.

Brief for Appellees.

I.

THE ORDER VACATING THE ORDER PRO CONFESSO ENTERED BY THE CLERK WAS PROPERLY MADE, AS (A) THE ORDER PRO CONFESSO ITSELF WAS VOID, FOR NONE OF THE PARTIES WAS IN DEFAULT, AND IN ANY EVENT, THE ORDER RESTED IN (B) THE DISCRETION OF THE LOWER COURT,—AND THE EXERCISE OF SUCH DISCRETION WILL NOT BE INTERFERED WITH ON APPEAL.

The first point urged by the appellants is that the Court's order vacating the order *pro confesso* against the Palmer Union Oil Company, Lewis A. Hilborn and Palmer Oil Company, was error. The answer is, that neither of the parties was in default at the time the order *pro confesso* was entered; and in any view, the discretion exercised by a trial Court in opening a default will not be interfered with on appeal.

Preliminarily, it should be noted that the plaintiff caused the default of *all the defendants*, as well as of the three defendants referred to, to be entered. He entered the default of Frank L. Brown, George L. Walker, Charles E. Ladd, Gavin McNab, H. C. Stratton and George I. Stewart, individually and as directors of the Palmer Union Oil Company, including Lewis A. Hilborn as a director of that company, and Frank L. Brown, J. C. Kemp Van Ee, Lewis A. Hilborn, H. C. Stratton and Charles E. Ladd, as directors of the Palmer Oil Company, and in their individual capacities, the Anglo-California Trust Company and the Palmer Oil Com-

pany (p. 59). It is now conceded that the default was improperly entered as to all of the defendants, except the three named.

1. The action of the Court below was clearly right. Not one of the defendants was in default, and the order *pro confesso* was void. The facts are these:

The defendants, other than Palmer Union Oil Company and Lewis A. Hilborn; within the time required by the equity rules, filed their motion to dismiss the original bill (p. 94). The Palmer Union Oil Company and Lewis A. Hilborn answered (p. 93). This was in accord with Eq. Rule 29, which requires that defenses heretofore set up by demurrer, be set up by answer or by motion to dismiss.

The plaintiff, then, by leave of Court, filed an amended bill (p. 94).

Under Rule 32, it became obligatory upon all the defendants to answer this amended bill within ten days, unless the time was enlarged by the Court. Within ten days after the service of the amended bill, all the defendants appeared and filed their motions to dismiss the amended bill (pp. 43 et seq.). They were not, therefore, in default.

The appellants urge a strange and highly technical contention in this regard. They assert that as Rule 32 provides, "In every case where an amendment to the bill shall be made after answer filed, the defendant shall put in a new or supple-

mental answer within ten days," the defendants Hilborn and the Palmer Union Oil Company were precluded from filing a motion to dismiss the amended bill. Indeed, it was contended in the Court below, that where an amended bill was filed, no right to move to dismiss it existed on the part of any defendant. But this position seems now to be abandoned. But it is now contended that where a party has answered an original bill, he is precluded from moving to dismiss an amended bill. This construction of the rule, we think, leads to a manifest absurdity.

Rule 29 provides "that every defense, in point of law, arising upon the face of the bill" must be taken either by motion to dismiss or in the answer.

Upon the filing of an amended bill, therefore, it is plain that a defendant would have the right to take advantage of every defense which arises upon the face of the bill by either a motion to dismiss or answer. If the fact that a defendant has answered an original bill shall preclude him from moving to dismiss an amended bill, it is quite easy to deprive a defendant of his right to move to dismiss an action and to compel him to answer in every case. For by filing a bill of complaint, to which the defendant would either voluntarily answer, or, upon his motion to dismiss being denied, be compelled to answer, and thereupon amending the bill in more important particulars after answer filed, the complainant would successfully preclude

a defendant from moving to dismiss this amended bill; he would thereby compel an answer to a cause of action interjected into the case for the first time after answer filed. This construction of the rules works a manifest hardship upon the parties, and would, in effect, lead to the denial of the right to move to dismiss a defective amended bill.

Moreover, the default claimed would not prove to be of any value to the plaintiff in this case. The Court could enter no decree as to the defaulting defendants, upon a bill which it orders dismissed. See *Snow v. De La Vega*, 15 Wall. 562. Being a stockholders' suit, and the relief running against the corporation, its officers and directors, no effective decree could be entered unless all parties were in default, and the defense of one would enure to the benefit of all.

Snow v. De La Vega, 15 Wall. 562.

2. The default as to Palmer Oil Company was void upon its face. It never at any time appeared in the suit. The service of process attempted to be made upon the Palmer Oil Company was void. It affirmatively appears from the marshal's return (p. 41) that he served it upon a person who was *not* the secretary of the company, and that at the time the company had no legal existence (pp. 41, 42). The bill of complaint alleges that prior to the commencement of the suit, the Palmer Oil Company went out of existence (p. 25). The pro-

posed amendment to the bill recognizes that this company had no legal existence (p. 77). There being no corporation known as the Palmer Oil Company at the time the suit was commenced, the service of process upon it was utterly void (see *Newhall v. Western Zinc Mining Co.*, 164 Cal. 380); and the fact that the service of process was void appears upon the face of the return and upon the face of the bill itself. There was no one who could appear in the name of the Palmer Oil Company, and no one appeared for it. It would have been, indeed, a misdemeanor, under the laws of California, for which any officer of the corporation, or for any attorney of the company to have attempted to appear for it; by so doing he would have made himself criminally liable under Sec. 9 of the Act of March 20, 1905, as amended (see *Newhall v. Western Zinc Mining Co.*, supra).

3. It will, of course, be conceded that an order vacating a default decree will rarely, if ever, be set aside in an appellate court. The disposition, of course, is to hear matters upon their merits, and where a *nisi prius* tribunal has exercised its discretion in favor of such a trial, such discretion will never be reviewed in an appellate tribunal.

In the present case, however, there was no final decree *pro confesso*, as referred to in Rule 17. That rule provides that when an appeal is taken *pro confesso*, the Court may proceed to a final decree at any time after the expiration of thirty

days after the entry of the order *pro confesso*; and it further provides that such a final decree *pro confesso* shall be deemed absolute, unless the Court shall, at the same term, set aside the same, or enlarge the time for filing the answer. Here it is contemplated, inferentially at least, that final decrees *pro confesso* may be set aside, with the proviso, however, that no such motion shall be granted except upon payment of costs, and unless the defendant shall undertake to file his answer, as directed by the Court, for the purpose of speeding the cause. The order *pro confesso* in the case at bar was not a final decree *pro confesso*, but was the preliminary order *pro confesso*, which is grantable, of course, by the clerk, under Rule 5, and that rule says that all orders grantable by the clerk,—among which, of course, is the decree taking bills *pro confesso*,—"may be suspended or altered or rescinded by the judge upon special cause shown." The application in the Court below was an application to the judge, under this rule, to rescind the order *pro confesso* entered by the clerk. As the cause had not proceeded to a final decree, and could not at that time have resulted in a final decree until the expiration of thirty days from the order *pro confesso*, a ruling by the judge, in the exercise of his discretion, vacating the order *pro confesso* by the clerk, is hardly reviewable in this Court.

And no decree of any kind could be entered on this alleged default, as the cause was at issue with respect to other defendants.

See

Snow v. De La Vega, supra.

4. Finally, the plaintiff himself admitted that his bill was defective and must be amended. Such an amendment would open the default as to all. Hence appellants' first point is, in reality, a moot one.

II.

THE AMENDED BILL IS MULTIFARIOUS, AND IS CLEARLY SUBJECT TO THE OBJECTION THAT IT OMITTS THE JOINDER OF NECESSARY PARTIES.

1. One of the grounds for dismissing the suit in the Court below was, that the Palmer Senior Oil Company, and the bondholders of the Palmer Union Oil Company, were necessary parties to the suit (p. 70). It is very clear that this objection is well taken.

The amended bill shows that the Palmer Senior Oil Company was incorporated under the laws of the State of California (p. 10), and that thereafter, in consideration of the capital stock issued to the individual defendants by that corporation, they transferred to it an option to purchase a certain tract in the Santa Maria Oil fields; that thereafter the Palmer Senior Oil Company transferred to the Palmer Union Oil Company all of the assets of said

corporation, including said option, to the Palmer Union Oil Company; and that the consideration paid said Palmer Senior Oil Company by said Palmer Union Oil Company for said option and assets was the capital stock of said Palmer Union Oil Company, amounting to 1,750,000 shares of said Palmer Union Oil Company.

It further appears from the amended bill that a bonded debt was created by the Palmer Union Oil Company upon all of its property, including the property transferred to it by the Palmer Oil Company (p. 29). The defendant Anglo-California Trust Company is alleged to be the trustee of this bonded debt. The complaint further alleges that the Palmer Union Oil Company has sold \$500,000 of these bonds to various persons (p. 30), and that \$250,000 of them were deposited with the defendant Anglo-California Trust Company as security for the \$250,000 which was to be paid by the Palmer Senior Oil Company for the property under the option aforesaid (p. 30).

All these transactions are alleged in the bill to have been fraudulently done, and relief against them is sought in this suit. The character of this relief is indicated by the fifth prayer of the amended bill, which reads as follows (p. 36):

“5. That the transaction whereby said Union Company acquired from said Palmer Senior Oil Company the said option to purchase of defendant Anglo-California Trust Company the lands covered by said option, in security for the purchase of which lands by

said Union Company two hundred thousand dollars of bonds of said Union Company were by said Union Company deposited with said Anglo-California Trust Company, be rescinded in so far as said bonds constitute any lien or claims upon the assets of said Palmer Company, and that all mortgages or other liens or claims upon the property of said Palmer Company, so transferred to said Union Company, executed, made or given by said Union Company, be declared null and void and of no effect."

It is very clear, from the foregoing statement, that the relief sought by the bill, or any relief warranted by this statement of facts, cannot be awarded without the presence of the Palmer Senior Oil Company. That company is not alone a proper and necessary party, but is, indeed, an indispensable party. How can the transfer from the Palmer Senior Oil Company to the Palmer Union Oil Company of certain property be undone and cancelled, as is sought by this amended bill, without the presence of the Palmer Senior Oil Company? How can any kind of relief be awarded to plaintiff in this action without considering the rights of the Palmer Senior Oil Company, and giving it an opportunity to be heard? This appears to us to be so plain as to require no further discussion.

2. The bondholders of the Palmer Union Oil Company are likewise clearly necessary parties to this suit, and the objection taken below on this ground is well taken. The statement of the contents of the bill under subdivision 1, *supra*, is suffi-

cient to show the merits of this objection. Recapitulating that statement, it appears from the bill that after all the property of the Palmer Senior Oil Company, together with the physical assets of the Paula, the Palmer Junior and the Palmer Oil Company, had been transferred to the Palmer Union Oil Company, that company created a bonded indebtedness upon its property. This bonded indebtedness constituted a first lien upon its assets. The bill then alleges that the Palmer Union Oil Company "sold \$500,000 of said bonds, and the money derived therefrom, the amount of which is unknown to your orator, said directors recklessly and wantonly spent partially upon said property and partially for purposes unknown to your orator" (p. 30). The bill further alleges, as already stated, that \$250,000 of these bonds were deposited with the defendant Anglo-California Trust Company as security for the payment of the \$250,000, the purchase price agreed to be paid for the option on the real property aforesaid. We have already quoted paragraph 5 of the prayer of the bill, from which it appears that the lien of this mortgage upon the assets of the Palmer Union Oil Company is sought to be cancelled and annulled, as well as a cancellation of the transaction whereby the Palmer Union acquired the option and other property from the Palmer Senior Oil Company.

It appears, therefore, that a large number of bonds are outstanding in the hands of third persons. The holders of these bonds suppose that they have

a first lien upon the property of the Palmer Union, which includes all the assets of the Palmer Oil Company, Palmer Senior, Palmer Junior and Paula Oil Companies. In this action, there is sought a judgment cancelling this lien. Obviously, it is not necessary to cite authority to the point that the kind of relief prayed for, or any relief warranted under the facts stated in the bill in this connection, cannot be granted until these bondholders are made parties defendant and given an opportunity to be heard. This point likewise appears so plain to us that we forbear to discuss it, and the ruling of the Court below in this connection was clearly correct.

In this regard, it is contended by appellants that this objection was not made in the Court below. But it was not necessary for appellees specifically to make this objection. The bondholders were indispensable parties, and the Court below knew that it could not award any relief consistent with the case made, without their presence. While, as a general rule, it is true that the objection that parties are not joined as defendants is deemed waived unless specifically made, there are instances in which the Court, of its own motion, is in duty bound to make this objection.

See

O'Connor v. Irvine, 74 Cal. 435;

Winter v. McMillan, 87 Cal. 265;

Mitau v. Roddan, 149 Cal. 1.

This doctrine is especially true in the Federal Court, where the jurisdiction of the Court being

special and limited, though general in its character within its proper sphere, the relief awarded must be complete in itself.

See

Carrau v. O'Calligan, 125 Fed. 657.

III:

THERE IS A CLEAR MISJOINDER OF CAUSES OF ACTION IN THE AMENDED BILL, IN THAT (A) IT SEEKS TO SET ASIDE A TRANSFER OF PHYSICAL ASSETS FROM THE PALMER OIL COMPANY TO THE PALMER UNION OIL COMPANY; (B) IT SEEKS TO RECOVER FROM THE DIRECTORS THE VALUE OF THE PROPERTY THUS TRANSFERRED; AND (C) IT SEEKS TO RECOVER FROM THE TRANSFEREE, THE PALMER UNION OIL COMPANY, THE CONSIDERATION FOR SUCH TRANSFER.

It is very plain that these causes of action cannot properly be joined in the same suit. The first one, for example, involves a rescission of the transaction complained of; the others involve an affirmance of its validity. Causes of action which are antagonistic, and indeed, mutually destructive to each other, cannot, of course, be joined in the same complaint. The fact that the amended bill improperly joins these several causes of action, is very easily shown.

As the appellants concede that they attempt to set forth a cause of action for the recovery back from the Palmer Union Oil Company of the assets transferred from the Palmer Oil Company to the

Palmer Union Oil Company, it is not necessary to point out in the amended bill where the facts in support of this alleged cause of action are attempted to be set forth.

It is very easy, however, to show that this bill likewise sets forth facts leading to a recovery from the directors of the value of the property transferred.

Thus, in Paragraph 13 (p. 29), after alleging that the moneys derived from the sale of \$500,000 worth of bonds have been recklessly and wantonly spent upon the property, a discovery is prayed with respect to the sundry sums of money, the amounts of which have been paid on account of the purchase of the lands (p. 30). In the succeeding paragraph (p. 31) are found allegations with respect to the extravagant and reckless manner in which the Palmer Union Company is being operated, and discovery is prayed for all the debts, bonds, etc., which may become a charge upon the property of the Palmer Union Oil Company. The bill further sets forth in detail the facts with respect to the consideration which passed from the Palmer Union Oil Company to the Palmer Oil Company for its transfer of the property, and alleges that the subsequent act of the Palmer Union Oil Company in exchanging a portion of this consideration for other property was wrongful and fraudulent, and that it had no right to cancel the bonds which it received as consideration for such transfer (p. 22).

Paragraph 4 of the prayer of the amended bill prays for relief grounded upon these facts, and it reads as follows (p. 36):

“4. That said Union Company be decreed to restore to all and several the stockholders of said Palmer Company who may join herein and who shall return to said Union Company its said preferred and common stock, their several shares of Palmer Company stock theretofore by them delivered to said Union Company.”

Here there is sought, of course, to be recovered from the Palmer Union Company, the transferee, the consideration which was parted with by the Palmer Oil Company for the transfer of its property. In this aspect of the case, of course, the transfer of the assets from one company to the other is affirmed, but the consideration for this transfer is sought to be recovered.

The bill likewise sets forth a third cause of action to recover from the directors the value of the property thus transferred.

Thus, the facts previously set forth, coupled with the allegations as to the value of the property transferred, to wit, that the assets of the Palmer Oil Company were worth \$2,500,000 (p. 5), together with further allegations showing the alleged manipulation of the stocks and bonds of the company, state an attempted cause of action for the recovery from the directors, who were guilty of this manipulation, and who were charged as conspirators, of the value of the property thus transferred. Ac-

cordingly, we find that the 7th paragraph of the prayer of the amended bill reads as follows (p. 37):

“7. That a decree be entered adjudging that the said Frank L. Brown, Lewis A. Hilborn, J. C. Kemp Van Ee, H. C. Stratton and Charles E. Ladd, directors of said Palmer Oil Company at the time said assets of said Palmer Company were transferred to said Union Company and at the time said bonds were delivered to said Union Company, jointly and severally as individuals, pay unto the said Palmer Oil Company for the use and benefit of its said stockholders the sum of two million dollars.”

It is too plain, we think, for discussion, that these causes of action cannot be joined in the same complaint, and the ruling of the Court below, therefore, sustaining this objection is clearly correct.

IV.

THE ORDER REFUSING LEAVE TO AMEND WAS CORRECTLY MADE.

1. The decree appealed from is a mere decree of dismissal. It does not dismiss the bill for want of equity, but directs simply that the amended bill of complaint be dismissed (p. 72). The decree, therefore, is not a dismissal on the merits, but a dismissal for the reason stated in the order (p. 71), and does not preclude, and was not intended to preclude, the bringing of another suit, if such a suit lies in the proper forum.

The objection, therefore, urged by appellants' counsel that the decree is one on the merits, and may possibly serve as an estoppel, is not well taken.

2. After the entry of this decree the plaintiff made a motion (p. 73) to amend the order entered March 2, 1914, granting the motion to dismiss, and to vacate and set aside the decree, and for an order granting leave to amend again the amended bill of complaint. This motion sought three kinds of relief, and it will be convenient to consider them separately.

It was sought first to amend the order entered prior to the decree, sustaining the motion to dismiss (p. 75). This order, of course, could not be amended by the Court until the decree dismissing the suit had itself been vacated. The only ground set forth in their motion for amending this order which was made by the Court, is that it was entered without notice to the plaintiff (p. 75), and that no opportunity was given to plaintiff to amend his bill of complaint in accordance with the Court's opinion, and that the Clerk of the Court never mailed or otherwise sent to the plaintiff or his attorneys a notice of the entry of said order. All these reasons are immaterial.

The motion to dismiss was regularly argued and submitted to the Court, and *both* parties were heard. The Court was not bound to notify any party that it was about to render a decision in the case; nor was the Clerk of the Court required to notify counsel that this order had been made. The rule of

Court requiring the Clerk to send copies of orders to the respective parties does not apply to orders made after notice, but only to orders made in the absence of parties who have had no notice of the application (see Eq. Rule 4).

The foregoing remarks apply also to the reasons urged for setting aside the decree. In other words, no reason whatever was assigned why the order directing a dismissal of the bill, and why the decree entered pursuant to that order, should be vacated and set aside.

We come now to the motion for leave to amend the complaint, which, of course, could not be granted until the decree itself was vacated, and which may be regarded as a motion to vacate the decree for the purpose of permitting an amended bill of complaint to be filed. The motion in this particular reads as follows (p. 76 et seq.):

“That plaintiff above named further moves this Honorable Court that he may be at liberty to amend his said Amended Bill of Complaint in the following particulars:

First: That said Amended Bill of Complaint be dismissed without prejudice, as to the following defendants, viz: Anglo-California Trust Company, a corporation; Frank L. Brown, J. C. Kemp Van Ee, Lewis A. Hilborn, George L. Walker, Charles E. Ladd, H. C. Stratton, Gavin McNab and George L. Stewart, as individuals and as directors either of said Palmer Union Oil Company or as directors of said Palmer Oil Company.

Second: That there be stricken from the first prayer of said Amended Bill of Complaint,

the last line thereof which reads as follows: 'or to a receiver, if such receiver be appointed as hereinafter prayed'.

Third: That the prayers for relief contained in said Amended Bill of Complaint numbered 3, 5, 6 and 7 be stricken out.

Fourth: That so much of said Amended Bill of Complaint beginning with the words 'California, having its principal place of business at Sisquoc', etc., at line 30, page 1, of said Amended Bill of Complaint, and ending with the word 'capacities', at line 14, on page 2 of said Amended Bill, be stricken out, and that there be inserted in lieu thereof the following: 'California, having its principal place of business in the City and County of San Francisco, State of California, and Frank L. Brown, J. C. Kemp Van Ee, Lewis A. Hilborn, H. C. Stratton and Charles E. Ladd, in so far as they claim to be, or may be found to be, Trustees of said Palmer Oil Company, the said Frank L. Brown, J. C. Kemp Van Ee, Lewis A. Hilborn, H. C. Stratton and Charles E. Ladd, claiming that said Palmer Oil Company has been dissolved and no longer exists as a corporation. Complainant alleges on information and belief that there are no creditors existing of said Palmer Oil Company.'

Fifth: That the title of this cause in said Amended Bill of Complaint be amended to read as follows:

Andrew Clauss,

Plaintiff,

vs.

Palmer Union Oil Company, a corporation, Frank L. Brown, Lewis A. Hilborn, George L. Walker, Charles E. Ladd, Gavin McNab, H. C. Stratton and George I. Stewart, as Directors of said Palmer Union Oil Company and in their

respective and individual capacities, Frank L. Brown, J. C. Kemp Van Ee, Lewis A. Hilborn, H. C. Stratton and Charles E. Ladd, as Directors of Palmer Oil Company, a corporation, and in their respective individual capacities, Anglo-California Trust Company, a corporation, First Doe, Second Doe, Third Doe, Fourth Doe, Fifth Doe, Sixth Doe, Seventh Doe, Eighth Doe, Ninth Doe, Tenth Doe, Palmer Oil Company, a corporation,

Defendants.

Sixth: And complainant prays for such further and other relief as to the Court may seem meet and equitable.”

(a) In the Court below, one of the reasons assigned for denying this application was, that the amendment proposed referred only to the prayer of the complaint, and did not in any wise change the amended bill (p. 80).

It will be seen that in thus ruling, the lower Court was correct.

The structure of the bill, with all its objectionable features, remains precisely the same after this amendment is allowed as before. The Court below, therefore, knew in advance, that if it allowed this amendment, *it would be compelled to grant another motion to dismiss*. To justify the Court in vacating a final decree, and to permit the filing of an amended pleading, the pleading proposed must at least be free from the objections found to exist in the previous pleadings. *The proposed pleading here*

is subject to all the objections previously sustained by the Court.

(b) There are other objections, however, to this amendment. It sought to amend the bill of complaint by dismissing, without prejudice, the case as to certain defendants. This was its first amendment (p. 76). This amendment, however, is contradictory of the 5th amendment, in which the title was changed so as to include all the defendants against whom the first amendment proposed that the bill should be dismissed (p. 77).

The second and third amendments sought to strike out a portion of the first prayer of the complaint, and all of the third, fifth, sixth and seventh prayers. The prayers in the complaint, of course, are not important, except as illustrations of the character of the action, and if the facts contained in the bill warranted a particular kind of relief, the Court would be justified in awarding it, even though no specific prayer for that relief were contained in the bill.

The objections urged to the bill were urged as against its substance or structure. These objections are by no means obviated by simply striking from the bill the relief which was prayed, based upon the facts thus stated. *Indeed, it leaves the bill in a more objectionable form than ever.*

The fourth amendment suggested consisted in striking out a certain portion of the narrative part

of the bill, and inserting in lieu thereof, the following (p. 77):

“California, having its principal place of business in the City and County of San Francisco, State of California, and Frank L. Brown, J. C. Kemp Van Ee, Lewis A. Hilborn, H. C. Stratton and Charles E. Ladd, *in so far as they claim to be, or may be, found to be*, Trustees, of said Palmer Oil Company, the said Frank L. Brown, J. C. Kemp Van Ee, Lewis A. Hilborn, H. C. Stratton and Charles E. Ladd, claiming that said Palmer Oil Company has been dissolved and no longer exists as a corporation. Complainant alleges on information and belief that there are no creditors existing of said Palmer Oil Company.”

The effect of this amendment is to leave the bill in a defective form in another particular. By the first amendment, as we have seen, the Anglo-California Trust Company, and *all the directors of the Palmer Union Oil Company*, and the same persons as individuals, were sought to be dismissed from the case (see p. 76). The bill, then, with this last amendment, will run against the Palmer Union Oil Company, the Palmer Oil Company, which it is alleged is disincorporated, and which, under the California decisions, cannot be sued, and certain persons claiming to be directors of the Palmer Oil Company, who are made conditional defendants contingent upon the status fixed upon them by the decree. *They cannot know that they are defendants in fact until after the case is decided.*

But the directors of the Palmer Union Oil Company, however, are necessary parties to this action,

and the allowance of the proposed amendments leaves the amended bill more defective than before.

It is, of course, settled law that in a stockholders' suit, where the directors are charged with fraud, they must be joined as defendants.

Ribon v. Chicago &c. L. Co., 16 Wall. 446;

Wickersham v. Crittenden, 93 Cal. 17;

Woodroof v. Howes, 88 Cal. 184;

Slattens v. St. Louis &c. T. Co., 91 Mo. 217;

See

Hawes v. City of Oakland, 104 U. S. 450.

(c) This leads us to state another reason why the motion to amend was properly denied. The lower Court had ruled that there was a misjoinder of causes of action and a non-joinder of parties. Had an application to amend the bill been made before the decree was entered, such an application should propose an amended bill *at least free from these objections. The amended bill as proposed is subject to the same objections as the original bill. It still misjoins causes of action and makes no offer of any kind to cure this objection. It does not join as defendants the bondholders whom the Court found to be necessary parties to the suit.*

It is decided, and it is plain the decision is correct, that the bondholders are necessary parties to the action. But there is nothing to show that their citizenship is not such as to divest the Court of jurisdiction. The presumption being against the jurisdiction of the Federal Court, this Court cannot

presume that if these bondholders were joined, that their citizenship would be of such a character as to confer jurisdiction upon the Federal Court. Jurisdiction by diversity of citizenship must be made affirmatively to appear. We are led, therefore, to the result that the Court is asked to allow an amendment, and to require the joinder of parties, whose presence the Court does not know will not oust it of jurisdiction. Indeed, we would be justified in saying, under the decisions, that there is a presumption against the jurisdiction of a Federal Court, that until the specific diversity of citizenship has been made to appear, the Court *does* know the citizenship of the parties to be such as to divest it of jurisdiction.

V.

THE MOTION TO AMEND THE COMPLAINT WAS PROPERLY DENIED AND THE SUIT ITSELF WAS PROPERLY DISMISSED, FOR THE REASON THAT IT AFFIRMATIVELY APPEARED ON THE FACE OF THE RECORD THAT THE SUIT DID NOT REALLY AND SUBSTANTIALLY INVOLVE A CONTROVERSY PROPERLY WITHIN THE JURISDICTION OF THE DISTRICT COURT, AND AS PROVIDED IN SECTION 5 OF THE ACT OF MARCH 3, 1875, THAT COURT WAS REQUIRED IMPERATIVELY TO PROCEED NO FURTHER IN THE CASE, EXCEPT TO DISMISS IT.

The record as printed in this case does not disclose, as it should, all the proceedings in the Court below (see p. 93). In denying the motion to amend

the complaint after the decree rendered, the Judge of the Court below said (p. 79):

“After the filing of said bill, a petition was presented by the attorneys for plaintiff on behalf of fifteen other stockholders of said Palmer Oil Company asking leave to intervene, and such leave having been granted by the Court, said attorneys filed a bill of intervention by said fifteen stockholders identical in all essential particulars with the original complaint. In this bill of intervention twelve of the plaintiffs owning 125,567 shares are citizens of California, and three owning 3,500 shares are citizens of other States. So that if the present motion were granted, we would have a situation with four plaintiffs citizens of other States owning in all 4,500 shares, and twelve plaintiffs citizens of California owning 125,567 shares, all in this court clinging to the complaint of a single stockholder, resident of Ohio, owning but 1,000 shares; and all represented by the attorneys of the original plaintiff. Under these circumstances, aside from the fact that the proposed amendments are for the most part amendments to the prayer of the original bill, and not amendments to the bill itself, the motion to amend will be denied, and it is so ordered.”

The omitted portions of the record show this statement of the Judge of the lower Court to be correct. The entire record, if before this Court, will disclose other facts. The bill itself was verified by one of the attorneys for the complainant, Andrew Clauss, and not by the complainant himself (p. 39). This attorney is one of the interveners and is a citizen and resident of California. He is designated as Jesse Olney, solicitor for com-

plainant, and Jesse W. Olney, as intervener. *The same attorneys who appear for the complainant appear as attorneys for the interveners.* While the title of the case in the Court below, up to and including the entry of the final decree, as well as the entry of the order denying the motion to amend the complaint, is, *Andrew Clauss v. Palmer Union Oil Company et al.*, the record shows a joinder of all these citizens in California with the plaintiff in the prosecution of these appeals. Thus, the petition for the allowance of an appeal addressed to the Court below recites that (p. 83):

“The above named complainant, *and* Victor Enginger, W. A. Grubb, Joseph Hamm, K. Halter, L. Schott, L. Lait, E. W. Clark, Jean A. Gourselle, M. C. Brooke, H. L. Brooke, Jesse W. Olney, Lilly M. Stewart, Theodore B. Wilcox, F. L. Shull, and Alvin J. Whitman, *co-plaintiffs* and interveners in the above entitled cause, conceiving themselves aggrieved”

* * *

In the assignment of errors, the same language is repeated (p. 85). The order allowing the appeal (p. 88), and the bond (p. 89), run in favor of the plaintiff and the co-plaintiffs. The citation on appeal (p. 100) is in favor of Andrew Clauss and all the other parties as appellants. The order enlarging the time for filing the record on appeal is made in favor of appellants (p. 103), and the title of the case in this Court is not “Andrew Clauss, Appellant, v. Palmer Union Oil Company”, but “Andrew Clauss, *and* Victor Enginger, W. A. Grubb, Joseph Hamm, K. Halter, L. Schott, L.

Lait, E. W. Clark, Jean A. Gourselle, M. C. Brooke, H. L. Brooke, Jesse W. Olney, Lilly M. Stewart, Theodore B. Wilcox, F. L. Shull and Alvin J. Whitman, Appellants”.

It stands out, therefore, plainly apparent upon the face of the record that this suit was collusively brought by a non-resident stockholder of the Palmer Oil Company in the Federal Court in order to permit the great body of stockholders, who could not themselves go into the Federal Court, to intervene and prosecute this action for their benefit. The suit is simply a convenient means of permitting California stockholders of a California corporation to invoke the aid of a Federal Court in their behalf, where otherwise they could not do so. This being so plainly apparent upon the face of the record, it was the duty of the lower Court to have dismissed the suit upon that ground alone.

If, however, the Court ought not to refuse to entertain jurisdiction, where the bill originally did not disclose that in the background were other stockholders represented by the same attorneys, who were subsequently to intervene, the fact that the action was being prosecuted on behalf of persons who could not get into the Federal Court was certainly a reason for refusing to permit the filing of an amended bill after decree entered, especially where the bill proposed to be filed was defective in substance.

Finally, it is quite clear that the suit was properly disallowed, for the reason that the amended

bill and the proposed amended bill failed to comply with Equity Rule 27, which reads as follows:

“Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action, or the reasons for not making such effort.”

This rule is mandatory, and the construction which the Supreme Court of the United States has placed upon it is very clearly set forth in *City of Quincy v. Steel*, 120 U. S. 241. This case also sets forth very clearly in its review of the previous decisions of the Court, the circumstances and conditions under which a stockholder may bring suit against a corporation to enforce the rights which the corporation fails to assert. *It also illustrates the application of the Act of March 3, 1875.* We take the liberty of quoting somewhat extensively from this case on all three points, as follows:

“Prior to 1875 cases had come into the courts of the United States, especially into the circuit courts, where citizenship had been simulated,

and parties improperly made or joined either as plaintiffs or defendants, for the purpose of creating a case cognizable in the circuit courts originally, or removable thereto from the state courts; and as it very frequently occurred that both plaintiffs and defendants were willing to seek that court in preference to the state courts, it had been found very difficult to prevent these improper cases from being tried in those courts. In the Act of March 3, 1875, an attempt was made to correct this evil, and by the fifth section of that Act it was declared 'That if, in any suit commenced in the circuit court, or removed from a state court to a Circuit Court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this Act, the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from whence it was removed, as justice may require.'

In the cases of *Hawes v. Oakland*, 104 U. S. 456 (26:830), and *Huntington v. Palmer*, Id. 482 (26:833), the question of the growth of the form of invoking federal jurisdiction, where it does not otherwise exist, by the attempt of a corporation which cannot sue in the federal court to bring its grievance into that court by a suit in the name of one of its stockholders who has the requisite citizenship, was very much considered. In order to give effect to the principles there laid down this Court at that term adopted Rule 94 of the Rules of Practice

for Courts of Equity of the United States, which is as follows:

‘Every bill brought by one or more stockholders in a corporation, against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since, by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action.’

The bill in the present case, although verified by oath, is far from complying with the letter or the spirit of this rule. It does not contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, although the allegation on that subject includes a part of the time in which the City of Quincy failed to pay for its gas; but inasmuch as the sworn allegation in the bill was made on the 18th day of August, 1885, and he there swears that he had been the owner of the stock on which he brings this suit over four years, it is easy to suppose that he acquired this stock after the 11th day of May, 1881, on which day the City by its official action notified the gas company that it repudiated the contract and would no longer be bound by it. And it is not an unreasonable supposition that the gas company, foreseeing litigation which it might be desirable for that company to have carried on in a federal court, im-

mediately after receiving notice of that resolution had this stock placed in the hands of Mr. Steel for the purpose of securing that object, and though the suit was delayed for two or three years, it was probably because the City continued to pay some part of the demand for the gas furnished by the company. The bill does not contain the allegation expressly prescribed by this rule, that 'The suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance'. The allegation of the bill, 'That this suit is brought in good faith, and for the collection of and to compel the collection of what your orator believes to be a meritorious claim', is by no means the equivalent of this provision of the rule; for it may very well be understood that the party who is seeking to enforce a debt which he believes to be due is acting in good faith for the purpose of compelling its collection, while he may be well aware that he is imposing upon the court to which he actually resorts a jurisdiction which does not belong to it.

The rule also requires that he must set forth with particularity his efforts to secure action on the part of the managing directors or trustees of the corporation of which he is a member, and, if necessary, of the shareholders, and the causes of his failure to obtain such action. In the case before us he seems to have made but a single effort to induce the directors of the gas company to institute a suit against the City to recover the money, and this was by a communication in writing addressed to the board August 1, 1885. No copy of that letter is produced, but it is said that the board of directors laid the communication on the table. No copy of the order of the board upon that subject is produced; no effort at conversation with any of the directors, or any earnest effort of any

kind upon his part to induce the directors to bring the suit is shown in the bill; no attempt to call the attention of the shareholders to this matter during the four years in which he said he was a shareholder, and during which time the City was failing to pay its debt to the gas company, nor any effort at any of the meetings of the shareholders or of the directors to induce them to enforce the rights of the company against the City, is shown. The most meager description possible of a bare demand in writing, made sixteen days before the institution of this suit, is all we have of the efforts which he should have made to induce this corporation to assert its rights. This letter was addressed to the board of directors August 1, 1885, from what point is not stated, but it may reasonably be inferred that it was from Alabama, of which state he was a citizen. The bill itself is sworn to the 13th day of August thereafter. How long a time was left for the consideration of this question by the board of directors, and what earnest efforts Mr. Steel may have made to induce their favorable action, may be easily inferred from the speed with which the bill was sworn to in Alabama and filed after he addressed his letter to the board. The inference that the whole of this proceeding was a preconceived and simulated arrangement to foist upon the Circuit Court of the United States jurisdiction in a case which did not fairly belong to it, is very strong.

In the case of *Hawes v. Oakland*, 104 U. S. 461 (26:832), in speaking of this perfunctory effort to induce the trustees of the corporation to act, it is said: 'He (the plaintiff) must make an earnest, not a simulated, effort with the managing body of the corporation to induce remedial action on their part, and this must be made apparent to the court. If time permits or has permitted, he must show, if he fails

with the directors, that he has made an honest effort to obtain action by the stockholders, as a body, in the matter of which he complains. And he must show a case, if this is not done, where it could not be done, or it was not reasonable to require it.' Again it is said: 'He merely avers that he requested the president and directors to desist from furnishing water free of expense to the City, except in case of fire or other great necessity, and that they declined to do as he requested. No correspondence on the subject is given. No reason for declining. * * * No attempt to consult the other shareholders to ascertain their opinions or obtain their action. But within five days after his application to the directors this bill is filed.'

In the case of *Huntington v. Palmer*, 104 U. S. 483 (26:834), the court says: 'Although the company is the party injured by the taxation complained of, which must be paid out of its treasury, if paid at all, the suit is not brought in its name, but in that of one of its stockholders. Of course, as we have attempted to show in the case just mentioned (*Hawes v. Oakland*, *supra*, 450), this cannot be done without there has been an honest and earnest effort by the plaintiff to induce the corporation to take the necessary steps to obtain relief.' See *Detroit v. Dean*, 106 U. S. 537 (27:300).

We think upon the face of the bill in this case there is an entire absence of any compliance with the rule of practice laid down for equity courts in such cases, and of any evidence of an earnest and honest effort on the part of the complainant to induce the directors of the gas company to assert the rights of that corporation. On the contrary, the clear impression left on reading the bill is that it is an attempt to have a plain common-law action tried in the court of equity, and the rights of

parties decided in a court of the United States who have no right to litigate in such a court, and that there is no sufficient reason in the bare fact that Mr. Steel is a stockholder in the corporation which justifies such a proceeding.”

For the reasons stated, therefore, it is respectfully submitted that the conclusion of the Court below is correct, and that the decree appealed from should be affirmed.

Dated, San Francisco,
November 9, 1914.

GAVIN McNAB,
B. M. AIKINS,
R. P. HENSHALL,
ROBERT R. MOODY,
NAT SCHMULOWITZ,
Solicitors for Appellees.

LUTHER ELKINS,
*Solicitor for Appellees, George I. Stewart
and Gavin McNab.*

GAVIN McNAB,
Solicitor for Appellee, Anglo-California Trust Company. 6

